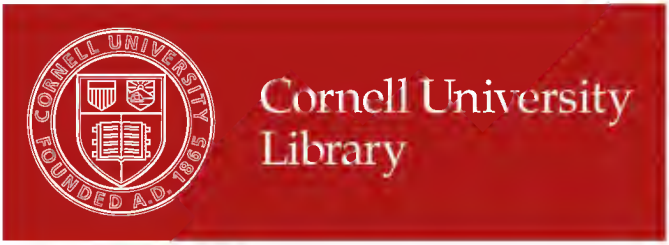
MAJORITY RULE AND THE JUDICIARY

WILLIAM L. RANSOM



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AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION

BY

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OF THE NEW YORK BAR

WITH AN INTRODUCTION BY

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TO THE LAMENTED

WILLIAM HENRY MOODY

WHOSE BRIEF SPAN OF SERVICE
IN THE SUFREME COURT OF THE UNITED STATES, ENDED BY MOST UNTIMELY
DISABILITY AND DEATH, GAVE PROMISE OF A PUBLIC USEFULNESS
ENTITLING HIS NAME TO RANK WITH THAT OF JOHN MARSHALL AS EXPONENT OF A
VIRILE AND PROGRESSIVE INTERPRETATION OF THE CONSTITUTION
WHOSE "UNCHANGINO PROVISIONS" HE CONCEIVED THEREBY TO BE "ADAFTABLE
TO THE INFINITE VARIETY OF THE
CHANGING CONDITIONS OF OUR NATIONAL LIFE"

PREFACE

THE attitude of some State courts toward what is generically spoken of as "welfare" or "regulative" legislation has led, chiefly in those States, to several proposals of constitutional change affecting the relation of courts to legislation. The people have been most reluctant to admit that either their constitutions or any instrumentality of government created by their constitutions should bar them permanently from any pathway of progress and justice which is pointed out by the experience, and called for by the conscience, of this and other civilized nations. The electorate has to no small degree lost patience with public men and political parties, who, like Dr. Nicholas Murray Butler at the New York Republican State Convention at Rochester in April, 1912, "urge" that a Workingmen's Compensation Law be enacted in this State, but suggest no way and support no plan for bringing that about, especially when so zealous a ten-word advocacy of such legislation is preceded and followed by a thousand-word plea for the resolute maintenance, evidently "without amendment,"[1]

[1] "It is said the constitution was made in the eighteenth century by men who lived under conditions long since passed away. Therefore, the constitution is outgrown. It must be adjusted, the phrase

of the very "constitutional guaranties" which the highest court of the State had but recently construed [1] forever to prevent *any* legislation based upon the essential principle underlying a Workingmen's Compensation Act!

The constructive proposals which have been made are entitled to be explained and considered upon their merits. Examination may show them —some or all—to be unsuitable or unwise; but they may not be brushed aside as "the ravings of Bedlam" [2] or as the proposals of "political patent-medicine men who are ignorant of ordinary laws of political and social growth." [3] The fact is, of course, that to no small degree these suggestions of organic change, as well as the legislation for which it is sought by them to clear the way, have been formulated or perfected in the seminaries of American universities and colleges, and that their advocacy has largely been led by members of the faculties of such institutions, whom Dr. Butler and his "Rochester platform" would doubtless hesitate to condemn more specifically.

now runs, to human rights. . . . The fact is that in the history of mankind some things, after long toil and tribulation are settled once for all. They neither invite nor permit amendment or improvement."

[1] Ives *v.* South Buffalo Ry. Co., 201 New York Reports, page 271.

[2] "The Supreme Issue of 1912:" Address of Dr. Nicholas Murray Butler as temporary chairman of the Republican State Convention at Rochester, N. Y., April 9, 1912; published in the *New York Tribune*, April 10, 1912.

[3] *Ibid.*

A great many things are being said about these proposals which no one can seriously mean and most persons will be glad soon to forget. That is probably because their discussion has been projected into a political campaign. Ambition is a strong stimulus to superlatives—about the other fellow and "his" "issues," especially if he comes from some other part of the country. The atmosphere of political discussion makes it easy for men to figure it all out that some one is about to "lay the axe at the foot of the tree of well-ordered freedom," when in fact no "axe" in sight menaces anything more than the "foot of the tree" of their own ambitions and the fancied interests of some of their friends. The discovery that some one—on the other ticket, in primary or election—was about to "lay the axe" to something cherished by the electorate, has been a frantic feature of every national political campaign whose "literature" it has been possible to trace.

The truth of the matter is, of course, that no considerable number of our people are contemplating any step which would *in fact* "destroy" or "threaten" the essential "independence" and "integrity" of our courts or the "stability" and "soundness" of their administration of impartial justice. If there is any branch of the government about which the American people have been gen-

uinely "conservative," it has been the judiciary; and this has been far more true of the rank and file of the people—the men in the village or on the farm, and the men in the enterprises of the industrial centres—than of the men who find it easy to feel that an attack on their own continuance in office or power is an attack on the continuance of the institutions they have weakly served. In the country as a whole, there are so many ways in which the courts come into close and cherished relations with the life of the average man and woman[1]—for example, in the administration of the estate of the dead relative, and the care of the interests of the minor child—that it is idle to suggest that any proposal under serious consideration by the people themselves is directed "at the foot of the tree of well-ordered freedom."

In a government by the people, we fight out recurring issues of governmental power and policy, oftentimes with a frantic feeling that a new and unheard-of "menace" must be met, else business will be prostrated, institutions fall, and our country turned over to some rampant form of "radicalism." It is always disconcerting, afterward, to go back to our histories and our records and there find that Don Quixote has often ridden full-tilt at wind-

[1] This fact is impressively elaborated upon by Governor Simeon E. Baldwin, of Connecticut, in "The American Judiciary" (1905), at page 219.

mills; that the same issues have been fought out before, with the same superlative phrases; and that the same dire prophesies were dismally made, only to be proved quite unfounded in the years which followed. To illustrate: Personally, I do not believe in the application of the principle of the "recall" to judicial officers. I sympathize with many of the arguments which are being so earnestly urged against "the judicial recall." Yet when I hear it contended that adoption of "the recall of judges" would mean the wholesale and whimsical removal of judicial officers and make our judges "vacillating and craven," I am unable to believe that either our people or our judges are of that mould of men. For I have it in mind that, long years ago—in Massachusetts[1] and Vermont, for example—the same cry was raised on the same issue, in almost identical phrases, directed against rather more objectionable forms of the "judicial recall" than are now being agitated, but that, when the voters of these conservative commonwealths rejected the counsels of great leaders of the bar and adopted decidedly "radical" expedients, no "axe" was laid "at the foot" of anything except the reputation of some lawyers as prophets of disaster!

We can afford to frankly face and fairly con-

[1] The proceedings in the Massachusetts Constitutional Convention of 1820 are extensively quoted from on pages 85 to 91, *post.*

sider any suggestion which may come from the people, looking to a better adjustment in the constitutional relation of the courts to the law-making power. There is a prevalent feeling—if not yet a settled conviction—that some readjustment in this respect is not far distant. Why this has come about, and what lines this change may most suitably follow at this time, will be dealt with in Mr. Roosevelt's introductory chapter to this volume and in the author's analysis of the legal and historical basis for such a readjustment. It will be sufficient here to say that a great many—probably a large majority—of our people have become *definitely conscious* that in some way either their constitutions or some of their courts are standing in the way of things which it should be possible for any civilized government to do, and are *definitely questioning* whether the onrush of economic and social change has not brought a real and irrepressible conflict between the needs of the people in the present day and certain constitutional provisions —notably the historic guaranty of "due process of law"—at least as construed by some courts.

I do not believe that the great majority of our people have ever assented, or will ever assent, to any extreme of view as to the judiciary or as to the maintenance of our constitutions in essential vigor. On the one hand, they give no sanction to any sug-

gestion that all our constitutions should be made "a fluid thing" or that the power of courts to refuse enforcement to legislation contravening the organic law should be taken away, and they are as "conservative" about accomplishing such an abridgement indirectly, through the wholesale adoption of frittering constitutional amendments, as directly, by the explicit taking away of judicial power. On the other hand, they flatly refuse to believe that the "stability" of our institutions and the "maintenance of our form of government" require that the pronouncement of a court, once made, upon a question of governmental power or policy, should be "beyond the power of a majority, or of all the people," to change or correct. And so it is that, not yet definitely or clearly formulated, perhaps, but none the less positive and unmistakable, there has come the feeling that the right of the matter lies somewhere in the middle ground.

That is frankly the point of view of the present volume, and that is, as I understand it, the position of Theodore Roosevelt, in proposing (1) that in the determination of what is "*due* process" under our State constitutions, there shall be an explicit constitutional recognition[1] of what Freund has called

[1] An illustrative form of such an "explicit constitutional recognition" is set out on page 115, *post*.

"the matured and deliberate popular will,"[1] and what the Supreme Court of the United States has recognized as "the prevailing morality or strong and preponderant opinion";[2] and (2) that as a potential check upon judicial misapprehension on the question whether any particular statute is a valid exercise of the "police power,"[3] the people shall be empowered, upon the petition of a specified number of electors, themselves to "*redefine*" what is "*due* process", in the sense of determining—by the method which is obviously the most direct, concrete, and conclusive—whether the "matured and deliberate popular will" does or does not hold the statute in question to be vital to the public welfare and so *within* the "police power." That the people are resolving to re-establish now, beyond peradventure, their power to put in force such humanitarian measures as they may deliberately determine to be most suitable for present-day needs, the temper of the current discussion leaves no doubt. If, as it seems, this proper power of a deliberate popular

[1] "The Police Power," by Ernst Freund, page 17.

[2] Noble State Bank *v.* Haskell, 219 United States Reports, at page 111; quoted on page 64, *post.*

[3] The "police power" is the term commonly used to indicate the general "regulative" powers of government—the power to place "restraints and burdens" upon persons or private property, in order to secure the "general welfare." For excerpts from judicial decisions as to "due process" and the "police power," see, respectively, pages 52 to 54 and page 59 *et. seq., post.*

majority has been doubted or denied in some States, it will be put beyond cavil now. *But the people seek a safety-valve and not an explosion!* They wish to make it suitably possible to do just things in a conservative and constructive manner, so that there may be no danger of a pent-up outbreak to accomplish the same ends in a sweeping and destructive manner.

May it not be that the proposal identified with the name of Theodore Roosevelt will prove the "safety-valve" of social legislation? We do not wish to take down *all* constitutional restrictions on an entire class or category of legislation, good or bad, merely to take one sound, wise law out from under the ban. The people do not seek a safety-valve like the whistle on the Mississippi River steamboat described by Lincoln, which stopped the boat whenever the whistle was blown, nor do they want the safety-valve of orderly progress in legislation "*tied down*" beyond the power of the people to utilize when needed. A method of dealing only with the specific statute when the need arises, rather than framing broad generalizations to take all similar statutes out of the prohibition pronounced by the court, has much to commend it to the conservative common-sense of our citizens. With those who believe that through the medium of the "general amendment" method, so adjusted

as to permit of genuine popular control, the people may, when they wish, remove any barriers which a court may place in the way of "welfare" or "regulative" legislation, I have no quarrel. The *principle*, rather than the *method*, is fundamental. But the farmer does not demolish his fences or take them down, that he may lead his horse from pasture to barn. Only the Chinese of Charles Lamb's fable burned the sty when they wished to eat roast pig. Is it not better that the people should pass, directly and by way of potential ultimate check, upon the public necessity and social justice of *a particular law* which some court may reject, than that, in advance and for all time, broad and paralyzing terms of general exemption should be written into our historic guaranties? Why break out a window, instead of merely raising it, for ventilation? Therefore, for those who take this view of the possible efficacy of the "general amendment" method, I have at least this question, whether Mr. Roosevelt's proposal may not, upon analysis, be found to offer, not a more "*radical*" method, but a more *suitable* method—less sweeping, not so far-reaching, attended by fewer possibilities of unforseen implications, yet concretely effective in achieving the ends of justice under the law.

This volume is, in essential outline, an amplification of an address delivered before the Brooklyn

Bar Association on April 12, 1912, under the title of "The People and the Police Power: An Advocacy of the Direct Expression of the Popular Will as the Ultimate Guide in Determining the Scope of the Regulative or 'Police' Powers of the State Governments." From a lawyer's point of view, that title was more accurately descriptive of the central proposition discussed than is the title given to this volume. At the same time, it is not believed that there will be found in such a discussion anything upon which any citizen may not form an intelligent judgment. The proposal of Colonel Roosevelt, and this volume, which has been written to make clear its proper relations to the American judicial and constitutional system, are submitted with a firm belief in the principle declared before the American Bar Association by a distinguished Federal judge—William Howard Taft—in 1895:

> If the law is but the essence of common-sense, the protest of many average men may evidence a defect in a legal conclusion though based on the nicest legal reasoning and profoundest learning.

No prefatory word upon this subject could properly be closed without frank acknowledgment of debt, in many details, to Theodore Roosevelt, whose stirring advocacy of the proposal identified with his name has won for it already a large popu-

lar approval, and to Dean William Draper Lewis, of the Law School of the University of Pennsylvania, whose high standing as a teacher of progressive legal doctrine gave great weight to his prompt and scholarly espousal of Colonel Roosevelt's constructive proposal. Anyone who writes concerning the relation of legal doctrine to social progress feels also his obligation to those splendid jurists, State and Federal—some of them in the nation's Supreme Court, but many others little known outside of limited jurisdictions—who have resolutely given twentieth-century meaning to old concepts, and thereby have made all republican institutions again the available instruments of justice.

WILLIAM L. RANSOM.

NEW YORK, *August* 1, 1912.

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INTRODUCTION

Mr. Ransom has rendered a service of marked value to the commonwealth by his clear exposition of the meaning and the need of the proposition for a referendum to, or review by, the people themselves of certain classes of judicial decisions by State courts. In discussing this matter, and all similar matters, really able and broad-minded lawyers—men of the stamp of Dean Lewis, of the University of Pennsylvania Law School, and Dean Kirchway, of the Columbia University Law School—can render service such as no laymen can render.

But no lawyer can render this service unless he remembers, as Mr. Ransom emphasizes, that the question is one *which concerns the people as a whole.* Neither the members of the bar nor the men on the bench have, as such and of right, any greater concern in the matter than other citizens. The constitution is the property of the people, not of any one class of the people. Its proper administration and interpretation concern immedi-

ately and vitally the people as a whole. From this stand-point, judges and lawyers are merely instruments for securing the right solution of certain questions in which all good citizens are equally concerned. How completely the self-styled republican leaders of to-day have wandered from the principles of Abraham Lincoln is shown by their refusal to apply to this question the principles which Lincoln laid down in discussing the Dred Scott case. He scornfully refused to treat the decision of the Supreme Court in that case as permanently binding on the people, or as a matter only for judges and lawyers; and he explicitly laid down the doctrine that the people were the masters of the courts, and that it was for the people and not for the courts to determine the principles and policies in accordance with which our constitution was to be interpreted and our government administered.

Our prime concern is to get justice. When the spirit of mere legalism, the spirit of hair-splitting technicality, interferes with justice, then it is our highest duty to war against this spirit, whether it shows itself in the courts or anywhere else. The judge has no more right than any other offi-

cial to be set up over the people as an irremovable and irresponsible despot. He has no more right than any other official to decide for the people what the people ought to think about questions of vital public policy, such as the proper handling of corporations and the proper methods of securing the welfare of farmers, wage workers, small business men, and small professional men. If in any State judges have given such bad service that it is necessary to render them liable to removal by the people, I should not hesitate to adopt the principle of the recall, a principle which for a century and a third has been explicitly recognized and insisted on as righteous in the Massachusetts constitution. But where, as in New York and Illinois, the trouble has been with the heads rather than the hearts of the judges, where the courts have delivered absurd and iniquitous decisions against the interests of the people in various constitutional cases although the judges themselves are reputable and honorable men, what is needed is not to recall the judge to private life, but to make his decision—or the constitution as he interprets it—square with justice and common-sense.

It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office—any other theory is incompatible with the foundation principles of our government. If we, the people, choose to protect tenement-house dwellers in their homes, or women in sweat-shops and factories, or wage-earners in dangerous and unhealthy trades, or if we, the people, choose to define and regulate the conditions of corporate activity, it is for us, and not for our servants, to decide on the course we deem wise to follow. We cannot take any other position without admitting that we are less fit for self-government than the people of England, of Canada, of France, who possess and exercise this very power. But the plan I propose for our people seems to me more democratic, and from every stand-point better, than the plan in vogue in France, England, and Canada, where the legislature is supreme over the courts. I propose to make the people supreme over both.

Two or three months ago, some eminent corporation lawyers of New York undertook the formation of what they styled an Independent Ju-

diciary Association. They proposed, to use their own words, "to combat the spread of two ideas," namely, the recall of judges and the referendum to the people of a certain class of cases of constitutional decisions; and they asserted, in President Taft's words, that these ideas laid "the axe at the foot of the tree of well-ordered freedom."

On April 10, 1912, speaking of this proposal, at Philadelphia, I said:

Many of the signers are distinguished men, standing high in their community; but we can gain a clew as to just what kind of well-ordered freedom they have in mind, the kind of "freedom" to the defence of which they are rushing, when we see among the signers of this call the names of attorneys for a number of corporations not distinguished for a high-keyed sense of civic duty, nor for their disinterested conduct toward the public; such as, for instance, the Standard Oil Company, the Sugar Trust, the American Tobacco Company, the Metropolitan Traction Company of New York, and certain defunct corporations, the looting of which has passed into the history of financial and stock-jobbing scandal and forms one of its blackest chapters. I find also the name of one of the attorneys for the Northern Securities Company, which some years ago was dissolved at the suit of the government instituted by my di-

rection; I notice the name of the attorney for the New York Stock Exchange; and I do not overlook that of a member of the bar of New York who some years ago was denounced by the very papers now applauding him and his associates, as a retained "accelerator of public opinion" in favor of certain measures of the Metropolitan Street Railway Company, which at that time were under general denunciation in New York as "traction grabs." These embattled attorneys for the defence of special interests oppose my proposal solely because they make it their life work to uphold privilege against the cause of justice, and against the interests of the people as a whole. They speak as if the matter were one only for the decision of lawyers. I hold that it is one for the decision of the people as a whole, and that lawyers have no rights in the matter beyond those of any other good citizens. I hold that some basis of accommodation must be found between the declared policy of the States on matters of social justice within the proper scope of regulation in the interest of health, of decent living, and working conditions and morals, and the attempt of the courts to substitute their own ideas on these subjects for the declarations of the people made through their elected representatives in the several States.

I do not question the good purpose of some of the eminent corporation attorneys of whom I

speak. But they are intelligent men, trained in their profession, and certain of them have at least a smattering of knowledge of the constitutions of our own and other countries. On the assumption that they have both intelligence and knowledge, it is impossible to credit them with good faith in the fears that they have expressed as above referred to, except on the supposition that their long experience as attorneys for corporations has finally rendered them genuinely unable to understand justice, and genuinely unable to think of a judge except as an instrument devised to protect privilege against the rights of the people by invoking the technicalities of the law for the purpose of preventing the obtaining of justice under the law.

This is a strong statement, and I would not make it of ordinary men who are misled by reading those New York papers owned or controlled by Wall Street, and who are misled by their belief in the men whom these papers speak of as leaders of the bar. As regards these citizens, I have nothing to say except that I wish it were possible for them to have access to channels of information which were not wilfully poisoned. But the case is wholly different, so far as the eminent lawyers themselves are concerned. These

men are not to be excused on the plea of ignorance. My proposal is for the exercise of the referendum, or right of review, by the people themselves in a certain class of decisions of constitutional questions in which the courts decide against the power of the people to do elementary justice. When under the "police power" or "general welfare" powers of government the legislature of a given State passes an act to do social or industrial justice, and the State court declares that the law is unconstitutional, then I propose that the people themselves, the masters of both legislature and court, shall, after due deliberation, decide which of their servants is to be sustained, so far as the particular act is concerned. When men of trained intelligence call this "putting the axe to the foot of the tree of well-ordered freedom," it is quite impossible to reconcile their assertion both with good faith and with even reasonably full knowledge of the facts.

All that is necessary to do in order to prove the correctness of this statement is to call attention to plain and obvious facts. Consider the present practice in various countries in which there is substantially the same "well-ordered freedom" as

in our own land—for instance, the republic of France—and various great English-speaking commonwealths of the British Empire, such as England and Canada, all of which are governed by their parliaments in substantially the same manner that we are governed. In these countries the decision of the legislature on constitutional questions is absolute and not subject to action by the judiciary, and whenever the courts make a decision which the legislature regards as establishing a construction of the constitution which is unwarranted, the legislature, if it chooses, can by law override that construction and establish its own construction of the constitution. Not long ago this very method was adopted in England. On that occasion the courts had held that labor unions could be treated as corporations and sued, and money taken from them by process of law. Parliament at once passed a law overriding the decision and summarily declared that the constitution should thereafter be construed by the courts in the directly opposite sense to the construction which they had adopted.

My proposal is merely to secure to the people the right which the Supreme Court of the United

States, speaking through Mr. Justice Holmes, in the Oklahoma Bank Cases, said they undoubtedly should possess. My proposal is that the people shall have the power to decide for themselves, in the last resort, what legislation is necessary in exercising the "police powers," the "general welfare" powers, so as to give expression to the general morality and the general or common opinion of what is right and proper. In England, Canada, and the other countries I have mentioned, no one dreams that the courts have a right to express an opinion in such matters, as against the will of the people shown by the action of the legislature. I do not propose to go so far as this. I merely propose to make legislature and court alike responsible to the sober and deliberate judgment of the people, who are masters of both legislatures and courts. This proposal is precisely and exactly in line with Lincoln's attitude toward the Supreme Court in the Dred Scott case, and with the doctrine he laid down for the rule of the people in his first inaugural as President.

I am not dealing with any case of ordinary justice as between man and man. Nor am I speaking of the recall of judges by popular vote, a measure

which I personally think should not be adopted in any community unless it proves impossible in any other way to get the judges to do justice—and I will add that nothing will so tend to strengthen the movement for the recall of judges as action seeking to buttress special privilege in the courts and to make them the bulwarks of injustice instead of justice. I am advocating the introduction of a system which will obviate the need of such a drastic measure as the recall. But it must be understood that my purpose is to get justice, and if justice is resolutely denied by the courts, I would adopt the recall or any other expedient which was found necessary for the achievement of the purpose.

If in any case the legislature has passed a law under the "police power" for the purpose of promoting social and industrial justice, and the courts declare it in conflict with the "due process" clause of the State constitution as laid down by the people, then I propose that after a period of due deliberation, a period which could not be less than two years after the election of the legislature which passed the original law, the people shall themselves have the right to declare whether or not the pro-

posed law is to be treated as constitutional. It is a matter of mere terminology whether this is called a method of "construing" or "applying" the constitution, or "a quicker method of getting the constitution amended." It is certainly far superior to the ordinary method of getting the constitution amended, because it is quick, definite, and certain. It will apply merely to the act at issue, and therefore will be definite and clear in its action; whereas actual experience with, for instance, the Fourteenth Amendment to the national constitution has shown us that an amendment passed by the people with one purpose may be given by the courts a construction which makes it apply to wholly different purposes and in a wholly different manner. The Fourteenth Amendment has been construed by the courts to apply to a multitude of cases, to which it is positive that the people who passed the amendment had not the remotest idea of applying it.

Some of our opponents say that under my proposal there would be conflicting interpretations by the people of the constitution. In the first place, this is mere guess-work on the part of our opponents. In the next place, the people could

not decide in more conflicting fashion, could not possibly make their decisions conflict with one another to a greater degree, than has actually been the case with the courts. No popular vote could reverse an earlier popular vote more completely than did the later decisions in the Supreme Court, in the Legal Tender Cases and the Income Tax Cases, when compared with the earlier decisions. At this moment the courts of Massachusetts, Iowa, and Washington, and the Supreme Court of the nation, construe the clauses of the constitution to permit one thing, and the Court of Appeals in New York construes identically the same language to mean the direct reverse; and this not as regards unimportant matters, but as regards matters of vital importance to the welfare of hundreds of thousands of citizens, in cases like the Workingmen's Compensation Act and the act limiting the hours of labor for women in factories.

The best way to test the merits of my proposal is to consider a few specimen cases to which it would apply. Within the last thirty years the Court of Appeals of New York has been one of the most formidable obstacles in the way of getting industrial justice which men who strive for

justice have had to encounter. Among very many other laws which this court has made abortive, or decided not to be laws, on the ground that they conflict with the constitution, are the following:

First.—The law for preventing the manufacture of tobacco in tenement houses. The decision of the court in this case retarded by at least twenty years the work of tenement-house reform, and was directly responsible for causing hundreds of thousands of American men and women now alive to be brought up under conditions of reeking filth and squalor, which immeasurably decreased their chance of turning out to be good citizens. Yet this decision was rendered by well-meaning men who knew law, but who did not know life, and who based their decision on the ground that they would not permit legislation to interfere with the "sanctity of the home"—the home in question, in many cases, having precisely the sanctity which attaches to one foul room in which two large families, one with a boarder, live and work day and night, the tobacco they manufacture being surrounded with every form of filth.

Second.—The court held unconstitutional the law under which a girl was endeavoring to recover

damages for the loss of her arm, taken off because dangerous machinery was not guarded. In this case the judges announced that they were "protecting the girl's liberty" to work where she would endanger life and limb if she chose! Of course, as the girl had no liberty save the liberty of starving or else of working under the dangerous condition named, the courts were merely protecting the "liberty" of her employer to endanger the lives of his employees, or kill, or cripple them with immunity to himself. I do not believe that there is an instance in our entire history in which a majority of the voters have shown such tyrannous and callous indifference to the sufferings of a minority as were shown by these doubtless well-meaning judges in this case.

Third.—When the legislature of New York passed a law limiting the hours of labor of women in factories to ten hours a day for six days a week, and forbade their being employed after nine in the evening and before six in the morning, the New York Court of Appeals declared it unconstitutional, and a malign inspiration induced them to state in their opinion that the time had come for courts "fearlessly to interpose" a barrier against

such legislation. Fearlessly! The fact was that the courts "fearlessly" condemned helpless women to be worked at inhuman toil for hours so long as to make it impossible that they should retain health or strength; and "fearlessly" upheld the right of big factory owners and small sweat-shop owners to coin money out of the blood of wretched girls whom they worked haggard for their own profit. To protect such wrong-doers was, of course, an outrage upon the decent and high-minded owners who did not wish to work the women and girls to an excessive degree, but who were forced to do so by the competition of the callous factory owners whom the court, by this decision, aided and abetted in their wrong-doing. Court after court in other States, including so conservative a State as Massachusetts, have declared such a law constitutional; yet the Court of Appeals in New York declared the law unconstitutional. No popular majority vote could ever be more inconsistent with another popular majority vote than is the record of the Court of Appeals in the State of New York in this matter, when compared with the record of other courts in other States.

Fourth.—The Workingmen's Compensation Act, but a year or two ago, was declared unconstitutional by the New York court, on account of its (alleged) taking of property without due process of law, although a directly reverse decision on precisely similar language in the constitution, had been rendered not only by the State courts of Iowa and Washington, but by the Supreme Court of the United States. This decision illustrates in ideal fashion what I mean when I say that human rights stand above property rights when the two conflict. Here again it is worth while to point out that no vote by popular majority could render the constitution more uncertain of construction than the Court of Appeals rendered it by making this decision, in the teeth of the decision of the Supreme Court of the United States and of other State courts; and throughout our history no decision by a majority of the people in any State has shown more flagrant disregard of the elementary rights of a minority. No popular vote in any State has ever more flagrantly denied justice than did this decision by the highest court in the State of New York but a year or two ago.

Now in these instances arising in New York,

the people of the State of New York, under the plan I propose, after due deliberation, would have had an opportunity to decide for themselves whether the constitution, which they themselves made, should or should not be so construed as to prevent their doing elementary justice in those matters. My proposal is merely to give the people an effective constitutional weapon for use against wrong and injustice.

Our opponents in effect take the position that the people have not the right to secure workmen's compensation laws, or laws limiting the hours of labor for women in factories, or laws protecting workers from dangerous machinery, or laws making conditions decent in tenement houses. It is a mere sham for any man to say that he approves of such laws, so long as he upholds the courts in declaring them unconstitutional, and fails to approve thorough-going action which will give the people power, with reasonable speed, to upset such court decisions and secure real and substantial justice.

In a recent article, Professor Scofield has shown that the State courts of Illinois have behaved no better than the State courts of New York in these

matters. He quotes the emphatic criticism of these decisions of which I complain, by the late Dean Thayer of the Harvard Law School. He says that these decisions make of the law a weapon with which the strong can strike down the weak; that they make of the law not a shield to protect the people, but a sword to strike down the people; that they are arbitrary, and that our protest against them represents one phase of the struggle against arbitrary power and in favor of the law of the land; and he sees that my proposal is merely a constitutional method to restore to the State law-making bodies the power which the Supreme Court of the nation says belongs to them.

There are sincere and well-meaning men of timid nature who are frightened by the talk of the "tyranny of the majority." Those worthy gentlemen are nearly a century behind the times. It is true that De Tocqueville, writing about eighty years ago, said that in this country there was great tyranny by the majority. His statement may have been true then, although certainly not to the degree he insisted, but it is not true now. That profound and keen thinker, James Bryce, in

"The American Commonwealth," treats of this in his chapter on the "tyranny of the majority," by saying that it does not exist. His own words are that:

It is no longer a blemish on the American system, and the charges against democracy from the supposed example of America are groundless. The fact that the danger once dreaded has now disappeared is no small evidence of the recuperative forces of the American government and the healthy tone of the American people.

I shall protest against the tyranny of the majority whenever it arises, just as I shall protest against every other form of tyranny. But at present we are suffering in no way from the tyranny of the majority. We suffer from the tyranny of the bosses and the special interests—that is, from the tyranny of minorities. Our respectable opponents among the leaders of business and the bar are acting as the servants and spokesmen of the special interests and are standing cheek by jowl with the worst representatives of politics, when they seek to keep the courts in the grasp of privilege and of the politicians; for this is all they accomplish when they prevent them from

being responsible in proper fashion to the people. These worthy gentlemen speak as if the judges were somehow imposed on us by Heaven, and were responsible only to Heaven. As a matter of fact, judges are human just like other people, and in this country they will either be chosen by the people and be responsible to the people, or they will be chosen by and be responsible to the bosses and the special interests and the political and financial beneficiaries of privilege. In the course they are taking, the great corporation lawyers are, in some cases certainly unconsciously, and in other cases I fear consciously, acting in behalf of the special interests, political and financial, and in favor of privilege, and against the interests of the plain people, and against the cause of justice and of human right.

I wish to keep the courts independent. But at present the independence of the courts is far more frequently menaced by special privilege than by any popular tyranny. I wish to protect them against both. The safe way to prevent popular discontent with the courts from becoming acute and chronic, is to provide the people with the simple, direct, effective, and yet limited power to

secure the interpretation of their own constitution in accordance with their own deliberate judgment, by the method I have above outlined.

THEODORE ROOSEVELT.

SAGAMORE HILL,
July 1, 1912.

MAJORITY RULE AND THE JUDICIARY

I

WHEN THE PEOPLE DISCUSS THEIR COURTS

For what may be said to be the third time in the constitutional history of the United States, the relation of the courts to the people has become a general subject of definite consideration by the people. For the third time in the political history of the United States, the relation of the people to the courts has become the paramount issue of a campaign for the presidential nomination, and probably for the presidential election as well. Evidences are on every hand that the people have determined themselves to scrutinize, and, if need be, to change such elements of defect as they may discover in the American judicial system. The people have resolved themselves to sit in judgment upon their own institutions for the administration of justice, as established by their organic law, and it is accordingly to "the ultimate sovereignty of the whole people," and not merely to organizations of the bar or even to the representative assemblies of government, that observations in defence or criticism must now be addressed.

This recurrence of a period of popular discussion of the judiciary is neither new nor surprising. The relation of the courts to the people is a perennial subject of consideration in any government in which the people have a voice. Particularly is this true under a federal form of government, where the first question asked as to any legislative proposal concerns its permissibility under the written constitution, and the determination of what *ought* to be done is required to await a consultation of precedents as to what *may* be done. Periods in which, as now, there is a general public demand for remedial legislation along humanitarian lines, as called for by changed and perhaps not-before-anticipated conditions, therefore become periods of *especial* popular interest in the courts, and in the restrictions which the courts place on what the people wish to accomplish through the medium of their government.

This fact is perhaps but another aspect of Dr. Dicey's brilliant generalization that "Federalism substitutes litigation for legislation,"[1] and his accurate observation that, under the American constitutional system, the most important issues of sovereign powers and policies are permitted to depend on the outcome of private suits between individ-

[1] "The Law of The Constitution," by A. V. Dicey, K.C., page 175 (7th Ed).

uals—issues that in any other government could not be raised in any court at all. Whether it is true, as Governor Simeon E. Baldwin, formerly the highest judicial officer of Connecticut, and a staunch defender of the judicial power as currently exercised in the United States, recently admitted,[1] that "this right of a court to set itself up against a legislature . . . is something which no other country in the world would tolerate," it is not the purpose of this volume, at this point or hereafter, to discuss. Equally foreign to the purpose of this volume is the discussion recently renewed with so much vigor,[2] whether it was the intention of the framers of the Federal constitution to vest the Supreme Court with power to decide the "constitutionality" of acts of Congress and whether there was adequate legal and historical basis for the decision in *Marbury* v. *Madison*[3] that such power had been vested. Certain it is that this power exists and that few would take it away, but certain likewise that this power of the American courts to prevent the enforcement of measures

[1] "The American Judiciary," by Simeon E. Baldwin, pages 103, 104 (1905).

[2] "The Power of Federal Judiciary Over Legislation," by J. Hampden Dougherty (1912); "The Supreme Court and the Constitution," by Charles A. Beard, (1912). *Cf.* Address of Chief Justice Walter Clark, of North Carolina, before the Law School of the University of Pennsylvania, on April 27, 1906, reprinted in the *Congressional Record* for July 31, 1911.

[3] 1 Cranch's (U. S.) Reports, page 137.

passed by the legislature and approved by the executive, if that legislation falls under the ban either of the clear constitutional mandate or the court's general conception of what is fundamentally fair and just in the premises, makes it inevitable that when the people discuss legislation, they also discuss the limitations raised by the recorded decisions of the courts. Whenever the barometer of the American conscience runs high, and the electorate resolves upon efforts for the relief of acute conditions that have come with economic and social changes, the public concern with this distinctive power of the American courts is intensified, and the leaders of public thought find themselves summoned to discuss and justify before the people the orderly progress of our constitutional system.

A better understanding of the present discussion will be promoted by a brief analysis of the issues which have precipitated similar discussion in the past. More than a mere coincidence is the certain similarity between them. The first period of especial popular concern with the courts came soon after the founding of the government. As population pushed its way westward from the Atlantic coast and new commercial and industrial conditions sprang into being, many persons wished that the new government might minister to their

new needs, in ways that the original colonies had not, and the new States could not, and in ways that had not been contemplated as within the chartered powers of the republic. The question became, in substance:

Should the Federal constitution be construed so as to enable the Federal government to make needed public betterments, fulfil its inherent functions for the public good, as the need might arise, and enforce a degree of conformance by the State governments to the standards laid down in the Federal instrument as construed by the Federal Supreme Court?

That proposal aroused a very great deal of momentary antagonism. The leaders who had opposed it as a matter of explicit constitutional mandate, when the constitution was being formulated, fought it no less vigorously when it was suggested as a rule of constitutional interpretation. Two presidents of the United States openly used their power and patronage to enforce a negative result.[1] Some of the most eminent members of the bench and bar—for example, Mr. Justice Gibson, of Pennsylvania, a truly great jurist—fought long[2] and bitterly against the progressive standards declared by Chief Justice Marshall in the Supreme

[1] "The American Commonwealth," by James Bryce, vol. I, pages 268 to 270 (revised ed.).

[2] Eakin *v.* Raub, 12 Sergeant and Rawle's Reports, page 330 (1825).

Court of the United States. In the end, however, the new trail blazed by the nation's court became the accepted constitutional path. The people in their sober sense wished their government to be living and vital, not dead and unresponsive.

The second period of wide-spread popular criticism of the courts came in the middle of the last century. The old wine was fomenting in new bottles, and the question was, in effect:

Should the Dred Scott decision—a perfectly good decision, doubtless, in law, judged by legal precedents and merely legal theories of the scope of the constitution—be permitted to stand permanently in the way of the enlightened public conscience of the time, or should existing precedents as to the rights of private property and the claimed prerogatives of some of the State governments be required to give way, in an orderly fashion, to the prevailing moral standards and the changed ideas as to what was the just social attitude toward hitherto recognized forms of private property and private right?

The court said it could only construe the letter of the law as it found it. A great mass-meeting was held in New York City, at which leaders of the city's financial and professional life pronounced the Dred Scott decision perfectly good law, and deplored all attacks upon it. "Somebody has got to reverse that decision," shouted Lincoln to

Douglas, "since it is made, and we mean to reverse it, and we mean to do it peaceably." But the court's disregard of the prevailing moral standards had provoked too far-reaching consequences before the processes of peaceable reversal could come about, and the overthrow of the Dred Scott decision took place under an Appomattox apple-tree and not at the polls.

Now we are at the threshold of a third period of marked popular discussion of the judiciary. There is, undoubtedly, less of rancor and resentment, less of hate and impatience, and far more of good humor and self-restraint, in the present discussion than there was in that of the past. Men have a respect now for the institution of the American judiciary that was plainly lacking in an earlier day. Present discussion and criticism is generally of a constructive tenor, and the leader who has nothing but denunciation and reproach to offer usually receives little heed from the masses of the people. Yet the fact cannot be escaped that there is being said much which is unfair and destructive, and that there is being advocated much which is drastic and dangerous, and that there is a wide-spread popular impatience with the barriers which at least some of the State courts have placed in the way of salutary measures of

social reform. For example, in an article contributed by Mayor William J. Gaynor, of New York City, to the April, 1912, issue of *Bench and Bar*, the jurist who served for many years with much distinction on the bench of the Supreme Court of the State of New York and now occupies a position of executive responsibility second to but one in the United States, asks and answers a question now in the minds of many, as follows:

Do the courts in this country stand in the way of social and economic progress? . . . Yes, they do, and have done so for a long time. But this is nothing new. In all ages, and pretty much everywhere, the courts have tried to apply their legal rules of thumb to social, commercial, and economic matters, always with signal failure, and generally with injury to industry, commerce, and the social good. Nothing is more distressing than to see a bench of judges, old men, as a rule, set themselves against the manifest and enlightened will of the community in matters of social, economic, or commercial progress. . . . The just feeling pervading the community is that a bench of judges is no more competent than the legislature to decide as to the wisdom or necessity of laws for the health, safety, and progress, and the material and moral welfare, of the community. That is a matter of enlightened opinion which the courts have no right to arrogate unto themselves.

Basic concepts of the law are being challenged and interrogated—Magna Charta itself is sum-

moned to the bar of a public opinion insistent on fixing the responsibility for injustice which seems to be safe-guarded by institutions reared to stamp it out. To quote again: Professor Edward S. Corwin of Princeton University recently declared:[1]

> The truth of the matter is that the modern concept *of due process of law* is not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the stand-point of vested interests, of a piratical tendency.

Mere criticism of the judiciary, or of any other agency of government, is, of course, to be deplored and resisted. Mere denunciation is neither an American method nor an effective method of dealing with problems of institutional reform. The fact, nevertheless, remains as to what the people *feel*, and the men who have voiced this criticism from the vantage point of honorable positions in public life have only spoken what was already, to an increasing extent, in the hearts and minds of the people. Any one who comes into close contact with numbers of people—in trades-unions, in organizations like the Patrons of Husbandry or the Farmers' Union, or in the give and take of small or large business transactions—realizes this full well, and no number of resolutions from bar

[1] *American Political Science Review*, May, 1912.

associations or pronouncements from disappointed political leaders can change the essential fact. The people believe in their courts, they admire and love many of their judges, yet they feel, vaguely, perhaps, but persistently, that something is wrong about a judicial system under which a few men obstruct the will and the needs of the many on matters which seem to involve no question of substantial right at all, so far as individuals are concerned, but only divergences of view as to what is expedient and proper so far as society as a whole is concerned. Members of the bar, in common with all others charged with responsibility for the leadership of public opinion, will fulfil their honorable and traditional positions in public affairs only if they avoid, on the one hand, the radicalism which would do violence to essential elements in our judicial and constitutional system, and, on the other hand, avoid also the mistaken conservatism which led so many to stand stanchly by the Dred Scott decision until the fields of Virginia ran red with blood. The discussion should rather be approached in the equable spirit indicated by Mr. Elihu Root in his address before the last annual meeting of the New York State Bar Association,[1] in January, 1912:

[1] U. S. Senate Document No. 271, Sixty-second Congress, second session (1912), reprinted on January 22, 1912, at the request of Senator Smoot.

One other thing we can all do, and that is to encourage and exhibit the true spirit of temperate and patriotic consideration, which is the primary requisite to success in working out the problems of self-government. *Some of the recent discussions of judicial conduct have been dignified and temperate expressions of reasoned opinion which we must respect, though we may not agree with it; such, for instance, as the recent article by Mr. Roosevelt in The Outlook* (referring to Mr. Roosevelt's earliest advocacy[1] of the direct popular "review" of the "constitutionality" of "police power" statutes). Some other expressions, however, have been rather exhibitions of violent temper and appeals to prejudice, imputations of sinister motive, and incitements to hatred. Such expressions we may not hesitate to condemn, and I am glad to believe that the condemnation will find a response among the great body of the American people.

[1] "Judges and Progress," editorial by Theodore Roosevelt: *The Outlook*, January 6, 1912, page 40.

II

THE PRESENT ISSUE AS TO THE JUDICIARY

It remains to characterize the present agitation as to the courts, and to define the fundamental issues therein, in the light of what has gone before. Gradually, but none the less surely, fair-minded members of the bar and thoughtful publicists are coming to realize that the present agitation is not the product of an ephemeral unrest or a blind discontent with established institutions, nor yet an angry repudiation of the reasonable restraints which lie at the basis of the social order. Only the shallow and the perverse can say that the present discussion reflects any such thing. Its causes are deep-seated and fundamentally sound; its recurrence in our political life and legal evolution is as normal and wholesome as it is inevitable. Only the unreasoned, the malicious, the hateful, in present-day commentary on the courts is to be deplored—the rest is a healthy manifestation of the capacity of the people for self-government, for we see issues that were productive of good in the

past now appearing in new phases to lead the way to greater national progress and stability.

The future historian of the law, if he correctly catches the spirit of our people in this hour, will accurately describe the present agitation as the deliberate demand of the people that, on the question of what their government may and should do for the amelioration of social or economic needs, hereafter the mature sentiment of the majority of the people shall prevail, if need be, against what a court may think the majority of the people think, or ought to think, should be done. In other words,

The present agitation is an effort to make the persistent sentiment of the preponderant majority of the people the ultimate and effective factor in determining the scope of the altogether elastic "police" or regulative powers of the State governments.

Perhaps even more accurately, as will presently be discussed in some detail, the current agitation may be described as

An effort to bring up to the broad and progressive rules and methods of interpretation applied by the Supreme Court of the United States, any State courts which may have considered themselves unable to accede to the social morality and prevailing public opinion of the time, and have felt constrained to interpose narrow and outgrown conceptions of the "police power" and "due process" to bar present-day measures for the relief of present-day conditions.

Anything which seeks or serves the supremacy of the social conscience in matters of the humanitarian activities of government is in accord with what is popularly called "the progressive movement" in American political affairs. Anything which tends unreasonably to restrain or permanently to bar the supremacy of the sovereign social conscience falls under the ban of popular challenge and disapproval. The line is being clearly drawn, as to men and institutions, and the search for safe and constructive remedies will be unavailing unless this ambition of the people to make their government actively minister to social justice is accepted as the test of every proposal for judiciary reform.

There are, at times, under discussion procedural matters relating to the law's delays and technicalities, which are not embraced by the above statement, and there have been suggested several constitutional changes, in respects affecting the judiciary, which do not seem necessary or wise for the effectuating merely of the ends above stated, but the proposition formulated may be said to represent the *crux* of the present agitation. Without belittling any current proposals for the elimination of the law's delays and the simplification of procedure, it remains true that they offer substantially nothing for the relief of the condi-

tion responsible for the present outcry, viz., what Mayor Gaynor so tersely called[3] "the just feeling pervading the community" that some of the courts have seen fit "to arrogate unto themselves," the power to nullify the exercise of the legislative power and thwart "the will of the ultimate sovereignty" of the people themselves, as to matters clearly representing no fundamental right at all, but only judicial disagreement with the legislative discretion and judicial reversal of the manifest political philosophy of the people.

[3] *Bench and Bar*, April, 1912, page 105.

III

THE POLICE POWER AS CONSTRUED BY STATE AND FEDERAL COURTS

To understand this problem of the proper relation of the people to the scope of the regulative powers of their government, it is necessary first to state and analyze the problem and see how it arises.

Practically all of the provisions of the State and Federal constitutions are, necessarily, what may for convenience be termed "specific" provisions. That is to say, they are definite and understandable expressions of the popular will, now or at the time they were adopted by the people; their meaning is ascertainable with reasonable certainty —from their own phraseology or from their context—under a layman's inspection, or, at most, under accepted rules of legal interpretation; and they clearly and specifically empower or forbid some department of government, or the inhabitants of some governmental unit, to do a definite and concrete thing or category of things. Such provisions no one suggests but that the courts should be permitted to interpret and apply; few

would suggest but that the courts should be permitted to continue to declare "void" any legislation which contravenes them. Therefore, it may be said that constitutional provisions of this explicit and "specific" character are in nowise involved in the present discussion.

To illustrate: Section 18, Article I, of the New York State constitution provides, as do similarly the constitutions of several other States, that

> The right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

This is a simple, definite proposition, with an unvarying and unvariable meaning under any meaning of interpretation, and, while judges, the legislature, or the people might now deem this provision no longer the safeguard to wage-earners that it was originally devised to be, no one would suggest that it means anything but what it says, or that it should be dealt with in any manner but the accustomed method of amendment or repeal, if no longer desired by the majority of the people. The provision was inserted in the State constitution, long ago, as a measure of protection to workingmen, to guard against the enactment of statutes such as corporate interests secured in some

States, limiting the amount which might be recovered by the estates of persons killed in the course of their employment. The adoption of such a constitutional provision marked the standard of progressive sentiment *at that time*, as to the degree of protection to be afforded to workingmen and their families. At the present time, of course, the enlightened sentiment of many persons favors the enactment of workingmen's compensation statutes, in which an essential element is the waiving of the common-law right of recovery which sounds in negligence. In so far as the constitutional provision quoted stands in the way of the establishment of a system of *compulsory* workingmen's compensation,[1] it has thus become now an obstruction to the very sentiment which originally was responsible for its embodiment in the organic law. Because it represents, however, a concrete expression of the fundamental will of the people, and bears no imputation that its application may be a mere substitution of the political philosophy of the judges for the social conscience of the people,

[1] In consequence of this provision, the commission which framed the statute held unconstitutional in Ives *v.* South Buffalo Ry. Co. (201 New York Reports, page 271), was compelled to provide that the act should not be deemed to abrogate or destroy any right of action then existing, and that the plan of compensation created by the act should apply only in cases where the workingman *waived* his existing rights of action by accepting compensation under the act or by instituting proceedings under the act.

this provision and those similarly "specific" are not within the scope of the present discussion. The process of repeal is, as to them, direct and effectual, if the provision is no longer desired.

Reference to another provision of this character may be helpful. Section 2 of Article I of the New York State Constitution provides, as do the constitutions of several other States, that

> The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever.

The Workingmen's Compensation Act signed by Governor Charles Evans Hughes was attacked as unconstitutional because violative of this section, as well as the section which will be next referred to. It was contended that the provisions of the act relative to the "scale of compensation" and the "settlement of disputes" between employer and employee as to payments under the act, were contrary to Section 2, Article I, in that the "scale of compensation" was designed to be "automatically" operative, and no provision was made for a jury trial as to the employee's right to recover anything from the employer, or the proper amount of such recovery. But this presented no question as to what the constitutional provision meant—that was clear. The question was what the act meant—whether its somewhat artful language said

that there should or should not be a trial by jury as to such issues. Upon this question of what the act provided, the Court of Appeals was very much divided,[1] and if the court had been compelled to decide this point in order to render a decision in the case, it would be difficult to indicate the probable position of a majority of the judges; but the court found no difficulty in saying, without a dissent, that

> If these provisions are to be construed as definitely fixing the amount which an employer must pay in every case where his liability is established by statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common-law jury.

Thus it may be taken to be the law in New York that Section 2 of Article I of the State constitution stands squarely in the way of any system of workingmen's compensation under which there is an elimination of a trial by jury in favor of "automatic" computation, in the statute or pursuant to it. Yet no one would seriously suggest that any other course should be, or should have been, pursued than to amend the constitutional provision, should it be desired to put in force a statute which abrogates trial by jury in this class of cases. No one would suggest that the court should construe,

[1] 201 New York Reports, pages 291 and 292.

or the electorate be permitted to declare, that explicit and unequivocal language means anything else than what it says, fairly interpreted. When the meaning which the court puts upon the language used is an enforcement of that which the people have, by their direct vote thereon, in terms and understandingly declared to be their sovereign will, the course at once most practicable and most consistent with constitutional government, is that the people shall proceed to make a new statement of their will as to that specific matter, if the old is no longer satisfactory. Even when the specific provision adopted by the people is ambiguous and capable of more than one interpretation, the question is still one of the legal interpretation of phraseology which was *intended* to be sufficient "within the four corners of the instrument," and at most involves no extrinsic inquiry beyond that as to the *intention* of its framers.

On the other hand, the Federal constitution, and most of the State constitutions, contain at least one provision which has no very specific and definite meaning in the language used in the constitutions, but has a meaning only under the ascertainment of various *facts* and *circumstances* wholly outside the instrument, so that its meaning concededly may, and necessarily does, vary widely with the jurisdiction, the litigation, the

locality, and the time. No argument is needed to emphasize how different a matter is the judicial "interpretation" and application of this provision from that of those just quoted. The legislative act to be tested by it may be ever so clear and definite, but this proviso does not mean anything definite or concrete at all, in and of itself, or considered in connection with anything else in the constitution. It represents no concrete expression of the popular will as to any particular situation, and it has a meaning and an applicability only by such standards of right and propriety as may be read into it by any agency of government entrusted with its interpretation. The reference is, of course, to the proviso of "due process" contained in the so-called "Bill of Rights," which has come down to us from Magna Charta.

Article V of the Amendments to the Constitution of the United States provides that

> No person shall be deprived of life, liberty, or property without due process of law.

The Fourteenth Amendment makes the enforcement of this constitutional guaranty *a sovereign Federal function* by providing that

> *No State* shall . . . deprive any person of life, liberty, or property without due process of law.

This same prohibition upon the powers of the States is, however, also contained in most of the State constitutions. For example: Section 6 of Article I of the Constitution of the State of New York, provides that

> No person shall . . . . be deprived of life, liberty, or property without due process of law.

The language of the constitutional proviso which the national government and its Supreme Court are authorized to enforce against the States is thus identical with that which the States are authorized to enforce against themselves. Under the American judicial system, a State court, in passing upon the validity of a State statute, considers it in the light of the provisions of the Federal as well as the State constitution, and may consider the statute to be under the ban of either or both. The Federal court, through the Fourteenth Amendment, may apply to State legislation the acid test of the same "due process" clause as the State courts construe. Has the identical language been accorded the same or similar interpretation? Has the Federal interpretation been followed in all of the States?

Unfortunately, as to a considerable number of the States, especially the older and more conservative States, the answers to these questions

must be in the negative. Few will doubt that the sentiment of the people, as well as the judgment of most experts in the law, cordially approve the broad and progressive pronouncements that have lately been made by Holmes and Moody and Hughes and White, and the other giants of the nation's great court. There is nothing which inspires a larger pride or firmer confidence in republican institutions than to trace in the reported decisions that court's splendid responsiveness to the changed economic and social needs of our time. Unfortunately, at least some of the State courts have found themselves *unable*, for reasons of controlling precedent or for other reasons—for the present it will be sufficient to say that no aspersion upon any court or judge is intended by anything contained in these pages—to at all keep pace with the progress of the people's court, but rather, as Mayor Gaynor pointed out in the magazine contribution already referred to,[1] have appeared to place themselves resolutely across the pathway of that progress. Right here is the responsibility for what sometimes seems, at first blush, to be a clamor against the courts themselves.

It is not the purpose here to multiply or magnify instances of what is meant. The cases are

[1] *Bench and Bar*, April, 1912, page 102.

familiar in which, for example, New York statutes regulating the hours of labor in a given trade or the conditions of labor in particular classes of industrial establishments have been copied or closely followed by other commonwealths, and as so enacted in other States have been upheld as "constitutional," both by the highest State court and by the United States Supreme Court; yet, when tested in the courts of the State of their first enactment, have been held "unconstitutional" by the courts of New York State, with no possible appeal to the Supreme Court of the United States from a decision *adverse*[1] to the constitutionality of the statute, and, therefore, with the result that what is perfectly "constitutional" in one State, under the "due process" clause of the Federal and State constitutions, is "unconstitutional" and nugatory in another, the State of its original enactment, under the identical constitutional provisions! It is hard to explain, to even the most intelligent of citizens, why beneficial legislation which the Supreme Court of the United States has held to

[1] Under the Judiciary Act, a decision in the highest Appellate Court of a State, *sustaining* a right asserted under the Federal constitution, does not present a question which may be carried to the Federal Supreme Court for review. Thus it comes about that a State decision *adverse* to the constitutionality of a statute becomes thereby the settled law of that State, and a precedent in other States, while a decision *favorable* to the statute may be taken to Washington for final review.

be "constitutional" when enacted by Oregon or Kansas, should be left nugatory in New York on the theory that it violates the very provision of the Federal and State constitution which the highest court of the land has specifically held it not to violate.

The circumstances of this wide divergence in what should be the fundamental law of the land would seem to be these:

The Supreme Court of the United States has given a *broad, vital, living interpretation* to the scope of the "police power" as affected by the "due process" clause.

Many of the courts of final appeal in the several States have found themselves unable, or unwilling, under the established precedents that are behind them in their respective jurisdictions, to do any such thing.

How this has come about may be briefly traced. Without attempting any precise definition of the "due process" clause, its requirements may, in effect, be said to be these:

1. That a man's "life, liberty, or property" shall not be "taken" except by *procedure* in accordance with the fundamental ideas of fairness and regularity which obtain in Anglo-Saxon juris-

dictions, which, of course, involves due notice, an opportunity to be heard, and some regularity of course of action.[1] This and this alone was the original intent and meaning of the clause in question—it was framed to prevent the *executive* branch of government, *i. e.*, the King or his representatives from coming around and arbitrarily and physically seizing and carrying off, without the authority of a parliamentary act and without notice or hearing before any tribunal, a man's physical property, such as his horse, his hoard of gold or silver, or his suit of mail. The suggestion that this clause applies to anything else, and especially that it restricts the *legislative* branch of government, is historically much more recent, as is also the inclusion of the further requirement:[2]

2. That "property" shall not be "taken" by any legislative act which violates *fundamental ideas of morality and justice*, keeping in mind the paramount public interests which may be involved.

[1] Farrar's "Report of the Argument in the Dartmouth College Case," page 267; quoted with approval in Hurtado *v.* California, 110 United States Reports, page 516, at page 535.

[2] That "due process," historically and as a legal concept, relates only to *procedure*, and not at all to matters of the substantial justice of the *result reached* by the procedure, is interestingly argued by Jesse F. Orton in an article in *The Independent* for August, 1912, his contention being that the "due process" requirement of the Fourteenth Amendment has come to include the element of "just compensation" only by a process of "judicial amendment of the constitution."

Rightly or wrongly, fortunately or foolishly, the "due process" clause has been made to involve, in this country, substantially the two requirements above indicated. From the latter of these two propositions, the so-called "police powers" inherent in a government may be said to determine their scope; that is to say, if a given legislative proposal, not in conflict with any "specific" constitutional prohibition, is also found, upon analysis, not to "deprive" an individual of his "property" in a way contrary to common standards of justice and fairness, both as to the method of doing it and the purpose for which it is done, the legislation is deemed to come *within* the "police power" and *not* to violate the "due process" clause.

In the closing years of the eighteenth century and the earlier years of the nineteenth, when our Federal and State constitutions were being formulated and given their almost equally formative construction at the hands of the courts, it was the basic social conception, first of the political philosophers and later of the leaders in the law itself, that government was based upon a shadowy "social compact," an agreement between those to be governed and the agency of government which they set up, and that under this "compact" there is an elaborate reservation of

powers—to the individual, the code of "natural rights" which comprise the so-called constitutional "guaranties", and in favor of the governmental units combining in any sort of a federalism, the so-called "reserved powers" of the people and those units. Under a system whose basic principle was the theory that the central government had only such powers as the written charter had expressly granted to it, and that all else had been reserved to the States or to the people, it was but natural that the highest court of the new federalism—composed as that court was of men drawn from all parts of the land, and from the ranks of those who were thus able to see that new conditions brought legislative needs which could not be ministered to by any arbitrary rule of thumb, uniform for all localities and circumstances—should be more inclined than either the State courts or even the Federal courts of limited territorial jurisdiction, to a broad and flexible interpretation of the regulative powers of government. Compelled to a liberal and progressive interpretation of constitutional provisions as the necessary means of giving vitality and efficacy to the national government itself, the nation's court became almost irresistibly the exponent of principles of the construction of written constitutions which, as Mr. Justice Moody said, made their

"unchanging provisions . . . adaptable to the infinite variety of the changing conditions of our national life." [1]

Likewise, in the earliest days of legislation and government, the *laissez faire* economists had permeated society with the conception that government should not interfere with the individual except to conserve the health, physical safety, or morals of society as a whole. In fact, under the simple economic conditions and the limited social conceptions then obtaining, health, safety, and morals were about all "the great public needs," the known ways of ministering to these things were simple and few, and there was little disposition to think that government had any very great or necessary relation even to these three things. Men and women cared very little whether their government did much of anything for the health or welfare of their neighbors, and the judicial decisions and doctrines of the time reflected the then prevailing morality and social standards. But from this it followed naturally, in the development of the law, that some of the State courts considered themselves *bound, under and by these precedents*, to take the position that they were unable to make their decisions *continue* to reflect

[1] The Employers' Liability Cases, 207 United States Reports, page 521.

the prevailing morality and changing social standards of the *subsequent* periods; that never thereafter could they sanction or uphold any regulatory proposal that could not be said to directly concern and conserve the health, physical safety, or morals of the people as first conceived and passed upon; and that *any regulatory law* which unfavorably affected the value of any property or the earnings of any business of any citizen, except a business "affected with a public interest"[1] or a business actually "outlawed" by statute, was "in violation of fundamental ideas of morality and justice," *unless* it directly and equitably conserved the public health, physical safety, or morals of the people as a whole.

Not only that view, but the original narrow view—narrow because of the simplicity of the conditions and the primitiveness of the social standards out of which the precedents arose—of the meaning and scope of the terms "health," "safety," and "morals," became fixed in unchallenged sway in many of the State courts. For example, in the so-called *Ives* case,[2] the New York Court of Appeals felt required to take the position that an act providing for the compensation of workingmen injured in the course of their em-

[1] Munn *v.* Illinois, 94 United States Reports, page 113; Budd *v.* New York, 143 United States Reports, page 517.

[2] 201 New York Reports, page 271, at page 302.

ployment in any of eight "inherently dangerous" trades did not "relate to" their "*health*," "*morals*," *or* "*physical safety*." And the eminent members of the New York bar who framed the constitutional amendment designed to "correct" and "reverse" the decision of the New York Court of Appeals in the *Ives* case felt the necessity of making a specific constitutional provision that "nothing contained in this constitution" (*i. e.*, the "due process" clause) shall "limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees"—as though the decisions of the court had left some doubt about this and as though this was the desired "definition" of the "police power"—and then, *even after this stipulation*, of continuing with the provision that nothing contained in the constitution "*shall be construed to limit* the power of the legislature to enact laws . . . for the payment of compensation for injuries to employees, or for death of employees resulting from such injuries"—as though the framers of the amendment could not feel sure that even after the adoption of a specific amendment, the requiring of "compensation for injuries to employees, or for death of employees resulting from such injuries" would be held to come within the category of "laws for the protection of the lives, health or safety of employees"!

On the other hand, under the liberalizing influences operative in the national sphere, the United States Supreme Court, from the first—and, it is fair to say, no inconsiderable number of the State courts—took a more elastic and progressive view of the scope of the "police" or regulative power. As early as the sixteenth of Wallace's Reports[1] (1872), the Supreme Court, in the so-called "Slaughter-House Cases" which involved the regulative powers of the State of Louisiana as affected by the "due process" requirement of the Fourteenth Amendment to the Federal Constitution, declared that the "police power" of a State was "the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community," and continued by saying:

It is much easier to perceive and realize the existence and sources of it than to mark its boundaries or prescribe limits to its exercise. *The power is, and must be from its very nature, incapable of any very exact definition or limitation.* Upon it depends the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. As says another emi-

[1] 16 Wallace's (U. S.) Reports, page 36.

nent judge, " . . . Persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this, no question ever was, or, *upon acknowledged general principles, ever can be made*, so far as natural persons are concerned." (Thorpe *v.* Rutland & Burlington R. R. Co., 27 Vt. 149.)

In *Hurtado* v. *California*,[1] which marked a milestone in the development of the law, Mr. Justice Mathews spoke concerning this very requirement of "due process" as follows:

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situations and system will mould and shape it into new and not less useful forms.

This view has persisted in the Supreme Court of the United States, and has, in general, been effectually and fairly applied. There have been exceptions, of course, even in that court, times when the numerical ascendancy in the personnel

[1] 110 United States Reports, page 516.

of the court, of men under the influence of the narrower State view and the *laissez faire* conception of the proper scope of governmental activities, seemed to incline the court away from the full and logical application of its fundamental standards. This was notably the result in the so-called Bakeshop Case[1] which involved the constitutionality of a New York statute. The result reached in that case may, perhaps, be explained and justified on other grounds, but in its underlying philosophy the decision therein made cannot be said to represent either the present or the prevailing doctrine of the highest court of the land.

It is also true that some of the Federal judges in the circuit or district courts have shown themselves profoundly influenced or completely dominated by the narrower views of the State tribunals of their respective jurisdictions, or by even more restrictive views, and have been persuaded by these local influences and affiliations to expound a doctrine of circumscribed governmental powers, and restrain the taking effect of regulative measures adopted by the State legislatures. This has caused a great deal of resentment against the judges of the Federal circuit, and district courts—in some parts of the country more of resentment than against the State courts, which the people

[1] Lochner *v.* New York, 198 United States Reports, page 45.

had found ways of making responsive to them. This feeling has been intensified rather than lessened by the fact that rarely has the interference with legislative discretion by the lower Federal courts found approval and support in the tribunal of ultimate appeal at Washington, as this has meant that the local judges have, by their interference, been able to accomplish a *wholly unwarranted* suspension—for one, two, or three years, pending the taking of testimony and the prosecuting of the appeal—of the taking effect of an act which the people of the State were finally held to have been entitled to put promptly in force.

In the nation's highest court, it may probably be said, the question whether a particular legislative act under consideration is within the scope of the "police power," has generally been deemed to be a matter of the reasonableness of the regulation *as a matter of fact*, under the particular conditions disclosed, rather than the application of any patent rule of thumb. As Freund says in his authoritative work on "The Police Power," an examination of the decided cases[1]

will reveal the police power, not as a fixed quantity, but as *the expression of social, economic, and*

[1] "The Police Power," by Ernst Freund, page 3 (1904); *Cf. Ibid*, pages 16 and 17.

political conditions. So long as these conditions vary, the police power must continue to be elastic, *i. e.*, capable of development.

As early as the one hundred and sixty-seventh of the United States reports (1896), the "police power" was said[1] "to extend to all the great public needs," and, coming down to the still later pronouncements of the court, we find the definition of the "police power" which is the corner-stone and bulwark of all or most of the present agitation. Certainly it is the strongest of judicial endorsement for the essential position of those who hold that in the ultimate analysis, the mature and deliberate opinion and the underlying social conscience of the people, as manifest through the agencies of legislation, must be the guide in determining what the government may do for the relief of acute and pressing social needs. In the decision of *Noble State Bank* v. *Haskell*,[2] followed in a number of similar and subsequent cases, the Supreme Court stated its conception of how far the "due process" and "police power" clauses of the State as well as Federal constitutions sanction the remedial legislation which the people themselves deem called for by the conditions of the times. "We must be cautious," said

[1] Camfield *v.* Brown, 167 United States Reports, page 518, at page 524.

[2] 219 United States Reports, page 104.

the court, speaking by Mr. Justice Holmes, "about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. . . . The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, *or held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare.*" [1]

Here, then, is the issue, and largely also the cause, of the present agitation very plainly revealed. On the one hand, is the narrow view of some State courts that the scope of the "police power" is a mere question of *law*, to be determined by purely legal precedents that antedate both our constitutions and our courts. Under this view, it is inevitable that present-day efforts for the relief of present-day needs should be continually harassed and held back by the curbing hands of eighteenth-century standards and eighteenth-century political and social philosophy. On the other hand, is the enlightened view of the great tribunal at Washington that when no explicit constitutional provision is contravened, the ultimate standard of what a State *may* do is its citizens' mature conclusion as to what they *ought*

[1] 219 United States Reports, page 104, at page 119.

to do, and that the question of the scope of a State's regulative power, so far as any but the "specific" constitutional curbs thereon, is a broad question of *policy and fact*, under the *particular conditions* disclosed, the determining factor to be the "prevailing morality" and the "strong and preponderant opinion" of the people as to what should be done.

A concrete and typical instance of just the way this divergence between the two rules of judicial action works out in practice, will be sufficient at this point. In the now celebrated *Ives* case,[1] the New York Court of Appeals unanimously held "unconstitutional," as *not* within the "police power" but within the *prohibition* of the "due process" clause, a workingmen's compensation law which had been drawn and revised by several of the ablest members of the New York bar, with advice and counsel of experts in other States and nations, including a number of judges of Federal and State courts. It may be remarked that, a few months later, the Supreme Court of the United States, in a case coming up through the Connecticut State courts and involving substantially the same questions of law, unanimously held "constitutional" [2] the statute there in question, and

[1] Ives *v.* South Buffalo Ry. Co., 201 New York Reports, page 271.

[2] Second Employers' Liability Cases, 223 United States Reports, page 1.

in terms rejected the precise grounds upon which the New York court reached the contrary result. How did the New York Court of Appeals say the scope of the regulative powers of the State government as affected by the "due process" clause should be determined? The able and argumentative opinion of the court, as prepared by Judge Werner, answers the question succinctly:[1]

> Every man's right to life, liberty, and property is to be disposed of in accordance with those *ancient* and fundamental principles *which were in existence when our constitutions were adopted.*

Learned counsel representing the Commission appointed by Governor Charles Evans Hughes, now of the Supreme Court of the United States, who also signed and strongly approved the statute rejected in the *Ives* case, called to the attention of the Court of Appeals the language used in the *Noble State Bank* case and other recent decisions of the highest court of the land, and argued, with some reason, it would seem, that if, as the Supreme Court had therein held, the "police power" of a State enabled it to require each bank to set aside, out of its own daily deposits, a percentage thereof to constitute a fund out of which the depositors of any other bank in the State that

[1] 201 New York Reports, page 271, at page 293.

might fail—through no fault of the depositors of other banks, of course—should be reimbursed, in whole or in part, as need be, surely that same regulative power should enable the State to require an employer to charge against the expenses of his business a sum for the compensation or reimbursement of any of his employees who might be injured while manufacturing the product or furnishing the service for which the employer charges the public. Counsel urged that the statute should be upheld because so undeniably demanded by the "preponderant opinion" and "prevailing morality" of the American people, and the "established usage" of nearly all of the civilized countries of the world. The court was urged to lay no forbidding hand upon the legislation which by the experience of other States and other countries was conceded to be of great benefit to the community and strongly called for by present-day economic conditions. But no, the court said: [1]

Every man's right to life, liberty, and property is to be disposed of in accordance with those *ancient* and fundamental principles which were in *existence when our constitutions were adopted.* . . . No word of praise could overstate the industry and intelligence of this commission in deal-

[1] 201 New York Reports, page 271, at page 293.

ing with a subject of such manifold ramifications and *of such far-reaching importance to the State, to employers, and to employees.* We have already admitted the strength of this appeal to a *recognized and prevalent sentiment.* . . . As to the cases of *Noble State Bank* v. *Haskell* (219 U. S. 104), and *Assaria State Bank* v. *Dolley* (219 U. S. 121), we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the "prevailing morality" or the "strong and preponderant opinion" it is deemed "to be greatly and immediately necessary to the public welfare," we cannot recognize them as controlling of our own construction of our own constitution.

Numbers of similar decisions[1] in New York and other States, might be cited as disclosing a similar position taken and similar language used, but it is not the purpose here to narrate or magnify instances of a condition concededly existent. Constructive discussion and not mere criticism or the marshalling of cases which have aroused popular resentment, is needed at this juncture. If the chief cause of complaint against courts and judges in general is that some of the State courts find themselves unable, under the precedents controlling them, or unwilling, to permit the legislative and executive branches of government to carry out the popular will on matters of regulative policy

[1] See introduction by Theodore Roosevelt, pages 16 to 20, *ante.*

and social justice, what are the current proposals for the relief of this cause of criticism? In what manner shall the fundamental law as interpreted by the nation's great court be given its constitutional vigor in the policies of laggard States?

IV

THE ULTIMATE SUPREMACY OF A DECISIVE POPULAR MAJORITY UNDER THE CONSTITUTION

The seriously considered proposals for judiciary reform are three:

1. That if a judge refuses enforcement to the people's deliberate will on matters of regulative or legislative policy, *the people should be enabled to reject or "recall" the judge.*

2. That if judges persist in holding legislation "unconstitutional" on grounds involving no "specific" constitutional provision, but amounting to an interference with legislative discretion and a misconception of the popular will, *the power of the courts to hold legislation "unconstitutional" should be taken away.*

3. That if a State court finds itself unable, under the legal precedents controlling it or its conception as to the permissible scope of "restraints and burdens to secure the general comfort, welfare, and prosperity of the State," to sanction "public welfare" legislation called for by the "prevailing morality" or the "strong and preponderant opinion," *the people should be per-*

mitted, in a deliberate manner, to determine whether the absence of favorable precedents should be disregarded and the court's misconception of the "prevailing morality" and popular will corrected.

Which of these three methods is to be preferred? If a judge sets himself against the popular will on "welfare legislation," shall we reject or "recall" the *judge*, honest and upright though he may be in all arbitraments between man and man; or shall we take away the power of all courts to exercise any check or curb, even in the first instance, upon the legislative branch of government, or shall we simply let the majority of the people, in some deliberate manner, substitute *their* determination of what *they* think and want, for the judge's mistaken view of what *he* thought the people thought and wanted, or *ought* to think and want? In that connection it may be observed that there are two methods which may be followed in substituting the majority's view for the court's view as to a particular law—the first, that of direct popular vote upon a constitutional amendment to render "constitutional" all that class or category of legislation; the second, that of a direct popular vote as to what is, in fact, the "prevailing morality" and "preponderant opinion" as to the particular law.

Before taking up the three proposals mentioned, it will be noted that there is not included

explicitly therein the view, more or less frankly expressed by many, that a decision of a court under the "due process" clause should be, and that it in effect now is, final and beyond the power of even a decisive majority to change in any manner whatsoever. When honest and well-intentioned, this "stand-pat" doctrine proceeds on the assumption that so-called "property rights" are absolute and beyond any public rights, and that the so-called guaranties of the "due process" clause are, or should be made and kept, something absolute and unchangeable, by popular majorities or anything else. This surprising view is not infrequently heard of late, more or less openly expressed. It appears to be the fundamental misapprehension so rhetorically indulged in by Dr. Nicholas Murray Butler, in his address[1] before the Republican State Convention in New York, in April, 1912, and in his monograph[2] on "Why Should We Change Our Form of Government?" Before the Aldine Club, in New York City, in March, 1912, Mr. Charles F. Mathewson, attorney for the Consolidated Gas Company, and one of the leaders of the metropolitan bar, made it very clear, in opposing Colonel Roosevelt's proposal, that *he* did not believe in *any* method

[1] *New York Tribune*, April 10, 1912; quoted from on page vii, *ante*.

[2] Charles Scribner's Sons (1912).

which would enable the people to regulate the hours of labor, and that *he* did not believe in correcting the *Ives* decision, even by the constitutional amendment proposed by his brethren of the bar, and passed by the New York legislature at its session of 1912. In the *New York Sun* and *The Times* for March 23, 1912, Mr. Mathewson was accurately quoted as citing "ten-hour" legislation as an instance of the attempted "tyranny of the majority over the minority," and as inquiring "what right has anyone to say that a man working ten hours for three dollars a day may not work twelve hours and receive four dollars?" That feeling, of course, was a perfectly logical reason for opposing Mr. Roosevelt's proposal, and for wishing constitutional amendment to be so difficult as to be virtually impossible; but, of course, such a view contravenes the basic idea of constitutional government, and, in fact, of government in any form, and is hardly reconcilable with anything except the "philosophic anarchism" advocated by the late Benjamin Tucker!

Needless to say, no such view of the paramountcy of purely private interests will find serious support in a republic. It is elementary law and policy that even "private property" is subject to "police power" regulation, and that, as

the Supreme Court said in the Slaughter-House Cases, "private interests must be made subservient to the general interests of the community." Neither in theory nor in fact is there foundation for the view that the "due process" clause, or any other part of any constitution, confers rights which a decisive majority may not limit, change, or withhold, in general or particular cases. As has well been said by the Appellate Division of the New York Supreme Court for the Third Judicial Department—a court of intermediate appellate jurisdiction—in the case of *Rathbone* v. *Wirth*, decided in 1896:[1]

A written constitution presupposes the existence of sovereign and absolute power. . . . In this country that sovereign and absolute power is the people. In the language of James Wilson, the most profound lawyer and student of government in the continental Congress and in the convention which framed the Federal constitution, "With us no prerogative of government can be set up as coequal with the authority of the people. The supreme power is in them; and in them, even when a constitution is formed and a government is in operation, the supreme power still remains. A portion of their authority they, indeed, delegate, but they delegate that portion in whatever manner, in whatever measure, for whatever time, to whatever persons, and on whatever conditions, they may choose to fix. The supreme power of

[1] 6 New York Appellate Division Reports, page 277, at page 287.

the people does not arise from the constitution or exist by virtue of it; it existed prior to it; it makes and unmakes constitutions, but is not made by them. . . . Under our form of government, that supreme power is vested in and exercised by the majority, and for all practical purposes the majority are the people. The principle that the majority shall govern lies at the very basis of our government."

The fundamental principle of popular government is stated by Mr. Herbert Croly in his splendid study of our constitutional system:[1]

The security of private property and personal liberty, and a proper distribution of activity between the local and central government, demanded at that time (when the constitution was adopted), and within limits still demand, adequate legal guaranties. It remains none the less true, however, that *every popular government should, in the end, and after a necessarily prolonged deliberation, possess the power of taking any action which, in the opinion of a decisive majority of the people, is demanded by the public welfare.*

And, as we have seen, the highest court of the land has held and declared that the regulative power of "a decisive majority" in any State "extends to all the great public needs" and enables the carrying out of what is "held by the prevail-

[1] "The Promise of American Life," by Herbert Croly, at page 35.

ing morality or strong and preponderant opinion, to be greatly and immediately to the public welfare."[1]

If the foregoing[2] states and sustains the true *theory* of popular government, it states also the essential *fact*. No matter how cumbersome, awkward, dilatory, and unsuitable the processes of constitutional amendment may be in any State, the existence of a mode of amendment contemplates it to be within the *power* of the people to use it for the purpose of altering or repealing any constitutional provision they may see fit, including the creation of special "exceptions" to or "constitutional definitions" of, the "due process" clause, by way of correction or reversal of a previous judicial decision or otherwise. For example, if a State court holds a workingmen's compensation or employers' liability act to violate the "due process" clause and the Federal court has held the contrary, it is within the *power* of the people ultimately to adopt and enforce a constitutional amendment which will remove all workingmen's compensation and employers' liability legislation from the prohibitions of the adverse decision, and from the future scrutiny of the courts, and thus carry out the popular will as to

[1] For further quotation from authority, see page 163, *et seq.*, *post.*
[2] Noble State Bank *v.* Haskell, 219 United States Reports, page 111.

the act previously pronounced upon adversely. That is just what is now being done in New York State.[1] It is also what has often been done in the States, and even in the nation as a whole, as to decisions determining the effect of "specific" constitutional provisions. When the Supreme Court held, early in the history of the republic, that a sovereign State might be sued in the Federal courts by a citizen of another State, the Eleventh Amendment to the constitution was forthwith adopted, concerning which the Supreme Court itself said, as recently as 1890:[2]

> This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.

Likewise when the New York Court of Appeals rendered a series of often conflicting,[3] but always "unpopular," decisions against the constitutionality of laws providing that employees of contractors on State or municipal work should be paid not less than the prevailing rate of wages,

[1] The constitutional amendment in course of adoption in New York to "reverse" the *Ives* decision is quoted on pages 146 and 147, *post.*

[2] Hans *v.* Louisiana, 134 United States Reports, page 1, at page 11; further quoted from at page 163 *et seq.*, *post.*

[3] See People *ex rel.* Cossey *v.* Grout, 179 New York Reports, at page 417, at page 420 *et seq.*

nor required to work more than a specified number of hours per day, an exasperated public "reversed" them all and removed all constitutional barriers by a constitutional amendment[1] adopted by the people in 1905. At the present time also, the several States of the United States, some years after the Supreme Court of the United States made an unanticipated reversal of its own previous decision as to the effect of a certain constitutional provision upon the power of the central government to levy an income tax, are engaged in the adoption of an amendment, ably advocated by Mr. Root, to "reverse" and "nullify" the decision of the nation's highest court.

In the light of this analysis of the American theory and practice, the question becomes not whether the popular will shall be expressed and enforced at all, following the State court's interpretation of the proviso of "due process" as applied to a particular act and situation, but simply *by what method* shall the popular will be reinstated and the court's misapprehension be set aside. This must necessarily be the case as to matters of regulative policy. As was said by the late Mr. Justice Harlan in one of the most impressive of his mighty utterances:

[1] New York State Constitution, Article XII, Section 1.

When the American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the government, and by judicial construction only is declaring what should be the public policy of the United States, *we will find trouble.* Ninety millions of people—all sorts of people with all sorts of opinions—are not going to submit to the usurpation by the judiciary of the functions of other departments of the government, and the power on its part to declare what is the public policy of the United States.

So, then, looking upon the matter as one of *method* rather than of *principle*, except, perhaps, in so far as differences of method may be said to present a question of principle, we may proceed to discuss the relative merits of the three proposals which are now before the people.

V

THE RECALL OF JUDGES

"The recall of judges" is the catch-word of the proposal that upon the petition of a specified percentage of the electorate, a judge whose personality or judicial acts are unsatisfactory to at least those who signed the petition, shall be required to submit his further tenure in office to the issue of a direct popular vote, prior and without regard to the expiration of the term for which he was elected or appointed.[1] Some State constitutions contain "recall" provisions not applicable to the judiciary, and in others the judiciary is not excepted. Usually, however, the "recall" of the judiciary is surrounded with especial safeguards, to ensure deliberate and representative action. A large percentage of the electorate—in some instances as high as thirty or even fifty per cent—is required to sign the petitions before a "recall" election can be initiated. A substantial period for "sober second thought" is required to elapse

[1] "Documents on the State-wide Initiative, Referendum, and Recall," by Charles A. Beard (1912); "Government By All the People," by Delos F. Wilcox (1912).

before the vote is taken. In some commonwealths the issue of the "recall" election is simply whether the official in question shall be required to retire to private life, and a later election held to choose his successor. In other commonwealths, persons offering themselves as candidates may contest the election with the incumbent whose tenure is attacked, and the outcome of the election is the continuance in office of the incumbent or the choice of his successor by the same vote which terminates his term. Sometimes it is provided that after a vote has once been taken as to the "recall" of a particular official, another election as to his continuance in office may not be precipitated, unless the persons filing the second petition pay into the treasury the expenses incurred in the holding of the first "recall" election. It is generally considered that a "recall" election involving a judge should be made more difficult and more fully safeguarded, than a similar contest as to the continuance in office of an administrative official.

If, however, judicial misapprehension and obstruction of the regulative policy and needs of the State is the condition which has aroused present criticism of the court, can it be said that the adoption of the "recall of judges" is the necessary

or proper remedy? Should judges who incorrectly interpret the "police power" necessarily be subjected to "recall" from office?

It is not difficult to understand why California —the State of Patrick Calhoun and Reuf and Schmitz and the Southern Pacific Railroad— adopted the "recall," even as to judges. It is not difficult to understand why Arizona—the State of Sloan and Andrews and railroad and mining corporations—is restoring the "recall" to the State constitution, from which it was removed at the behest of a presidential veto. No extraordinary powers of divination are required to understand the growth of sentiment for the "recall" in Pennsylvania—the State of Archbald and Elkin and Standard Oil. Yet, looking at the matter from the point of view of the problem analyzed in the preceding pages, does it not seem clear that the "recall" of judges is neither a wise nor a necessary means of securing a State interpretation of the regulative power in consonance with the Federal interpretation and with the progressive sentiment of the country? If a judge incorrectly gauges the "*preponderant* opinion" as to the social necessity for a particular law, why *remove* HIM? Why not let the people *vote* directly to decide what the majority opinion is? If a judge is dishonest, impeach him; if he is

incompetent, remove him by complaint before the legislature or refuse him re-election, but it does not seem quite fair to require him to take the *final* "guess" as to what the "*prevailing* morality" and the "*preponderant* opinion" of a State really is, and then chop off his judicial head if he "guesses" or "calculates" wrong.

Therefore, in so far as the demand for the "recall" of judges is based upon the relation of the courts to the legislative functions of government, the "recall" of judges is neither wise nor necessary, and should not be adopted unless, in particular States, it may be found justifiable on other grounds, or called for by local conditions. Is it not preferable that the *judge,* in his office, should be given a tenure independent of all political or personal or temporary considerations, to the end that he may administer justice *between man and man* "without fear or favor." Only his *conclusions* on matters of paramount *public* policy —not he himself or his tenure—need be subjected to a direct popular accountability, previous to orderly expiration of his term of office. Through proper adjustment of the appointive and elective terms of judges, through making their nomination and election wholly apart from party politics and party columns on the ballot, and through orderly and effectual processes of impeachment or

removal, other conditions which might lead to the adoption of the "recall" of judges would seem likely to be obviated. But not so as to judicial obstruction to "welfare" legislation; and current political events furnish a great deal of reason for believing that unless there is soon adopted a conservative and constructive remedy, the rising tide of insistent public opinion may adopt the radical remedy.

It is doubtless true, however, that well-intentioned persons of conservative bent of mind easily get very unnecessarily alarmed about the "recall," even of the judiciary. It is easy to think a lot of things might happen which would not. The cherished independence of the judiciary has not very much foundation or support except in the confidence and respect of the people. As Mr. Wendell Phillips said to the Massachusetts legislature in *Loring's Case* (1855), "you cannot legislate judges into the confidence of the people. You cannot preach them into it. Confidence must be earned." The adoption of the "recall" of judges would not make a politician out of many judges who were not politicians already. It is not possible to believe that fear of his removal from office would make any member of the New York Court of Appeals change, by one

jot or tittle, his conscientious attitude and course toward the legislation condemned by him in the *Ives* case, or toward other "welfare" legislation at variance with the *method* approved by the nation's highest court though that attitude and course may be. As Mr. William A. Prendergast recently declared, "to say that direct popular accountability would make a coward out of a public officer is like saying that it makes cowards out of soldiers to order them to the front upon the field of battle." Members of the bar have ever been prone to think that anything which would alter in any respect the *technical independence* of the judiciary, would thereby destroy its *actual and real independence.* That sort of fear has almost always proved unfounded.

Much that is reassuring may be found in the meditations based upon a reading of the minutes of the Massachusetts Constitutional Convention of 1820. They are referred to here because of their bearing also upon the whole present discussion of the relation of the courts to the people. The Massachusetts constitution, as first adopted, provided, as it does still, that "all judicial officers . . . shall hold their offices during good behavior," unless impeached for cause, or unless removed by the governor and council upon the address of a bare majority of the members of

both houses of the State legislature.[1] A similar provision for removal of judicial officers by a majority or two-thirds vote of both houses of the State legislatures, without the proving of legal grounds for impeachment "for cause," is to be found in several other State constitutions. In the Massachusetts convention of 1820, a distinguished committee was appointed to take into consideration the judiciary clause as above quoted. Its chairman was Mr. Justice Story, of the Supreme Court of the United States, and its membership included Chief Justice Shaw, Mr. Levi Lincoln, Mr. John Phillips, and others whose names are familiar for their ability at the bar and on the bench. This committee was sorely afraid that this liberal power of removal, for any reason or no reason, by a meagre legislative majority, without even requiring the legislature to state its grounds for such action, or give the judges in question an opportunity to be heard, was dangerous and should be changed.

"The committee is of the opinion," said this report[2] in 1820, concerning a constitutional provision that has ever since been in existence in Massachusetts and other States, "that this provision

[1] Massachusetts State Constitution, Chapter III, Articles I and II.

[2] "Minutes of Massachusetts Constitutional Convention of 1820" (prepared by Benjamin Pickering and the editor of *The Boston Advertiser*), page 136 (Reprint Ed. of 1853).

has a tendency materially to impair the independence of the judges, and to destroy the efficacy of the clause which declares that they shall hold their offices during good behavior."

In the debate upon this committee report, grave were the fears that the Massachusetts constitution would destroy the independence and integrity of the courts. Mr. Samuel Hubbard, of the Suffolk bar, thought that "the constitution was defective in not sufficiently securing the independence of judges."[1] Mr. William Prescott thought there was "now no security."[2] Mr. Prince, of Boston, thought that "the single admission (that judges have power to hold acts of the legislature unconstitutional) furnished a sufficient argument against leaving it to the *legislature* to remove them, for the exercise of this power in relation to a favorite law would be sure to lead to a resolve for their removal."[3] Mr. Daniel Webster, then lately come to Massachusetts, said that he looked upon the constitutional provision "as against common right, as well as repugnant to the general principles of the government. . . . The general theory and principle of the government is broken in upon by giving the legislature this power. If the legislature may remove judges at pleasure, assigning no cause for such removal, of course it is not to

[1] *Ibid.*, page 474. [2] *Ibid.*, page 477. [3] *Ibid.*, page 523.

be expected that they would often find decisions against the constitutionality of their own acts."[1] One who reads the debates in this convention cannot fail to be impressed how thoroughly and ably all the present arguments against giving the power of removal to the people were then urged, with equally dire predictions of public disaster, against leaving a power of removal in the hands of the legislature, and how much more impressive and applicable these contentions read when urged against leaving an arbitrary power to "recall" a judge at pleasure in the hands of the legislature, upon whose enactments he might have often to pronounce adversely!

Mr. Levi Lincoln, later the sturdy governor of the State and an honored justice of its Supreme Court, spoke in reply to Mr. Webster and the committee report. He said "he was not afraid of being called a demagogue" for stating the only foundation for a truly "independent" judiciary. His words—they are quoted from the minutes of the debates[2] as prepared in the third person, and published by Mr. Pickering and the editor of *The Boston Advertiser*, both members of the convention—have a peculiar applicability to-day:

It was said that judges have estates in their offices—he did not agree with this doctrine. The

[1] *Ibid.*, pages 482 and 483.

[2] Page 480.

office was not made for the judges, nor the judge for the office, but both for the people. There was another tenure—the confidence of the people.

And Mr. Henry Childs, of the Pittsfield bar, declared that the founders of the State constitution had "intended to put the judiciary on the footing of the fullest independence consistent with their responsibility."[1] In proof of this he referred to Sections 5 and 8 of the Massachusetts Declaration of Rights, which will hardly be challenged as radical or novel doctrine. Section 5, as contained in the Massachusetts constitution, then and now, reads:

All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

Section 8 of the Declaration of Rights, which was also referred to, was the first American statement of the "recall" doctrine. Even though it emanates from the greatest of the State constitutions among the original thirteen States, it would have little chance of being reaffirmed to-day by any gathering of members of the bar:

[1] *Ibid.*, page 479.

In order to prevent those who are vested with authority from becoming oppressors, *the people* have a right, *at such periods* and *in such manner* as they shall establish by their frame of government, to *cause their public officers to return to private life*, and to fill up *vacant* places by certain and regular elections and appointments.

Then came Mr. Justice Story, than whom, in the traditions of the American bar, the independence of the judiciary never had a stancher champion. As Mr. Wendell Phillips said[1] in 1855, "If anybody was, I may say, a little crazy on the subject of the independence of the judges, it was the late able and learned Judge Story—at least during the last half of his life." The closing of the debate in behalf of the committee report had been reserved until he could be present. He replied to Mr. Levi Lincoln and Mr. Childs by asserting that it was removal by the *legislature*, not the people, of which he was afraid. Removal by the majority of the legislature, he said (Mr. Pickering's notes[2] are again quoted), without necessarily the assignment of a reason therefor:

. . . is the provision of the constitution, and it is *only guarded by the good sense of the people*. He had *no fear of the voice of the people*, when he

[1] Address to the Massachusetts Legislature upon the petition for the removal of Judge Loring.

[2] Page 524.

could get their deliberate voice, but *he did fear from the legislature*, if the judge has no right to be heard. . . . The object of the amendment (reported from the committee) was *not to protect the judges against the people, but against the representatives of the people.*

However, in spite of the fears of the great leaders of the bench and bar, and in spite of the evident view of Mr. Justice Story that he would have no fear from *popular* removal but much fear of *legislative* removal, Massachusetts retained, by vote of her people, and still retains, the original constitutional provision for a "recall of judges" absolutely "at the whim of the legislature." What has been the result? Has the "independence" of the Massachusetts judiciary been "destroyed" or "substantially impaired"? Have Massachusetts judges ever felt that there was "now no security"? Have Massachusetts courts ever lacked in lustre or renown? Did its courts cease to hold acts of the legislature "unconstitutional," as Mr. Webster feared? Was the first decision adverse to the constitutionality of a favorite law the signal for "a resolve for the removal" of the judge or judges thus offending, as Mr. Prince was so certain it would be? On the contrary, the State whose constitution contains the "recall" doctrine in phraseology which could

hardly be improved upon, and the most drastic "judicial recall" provision that has existed in any State constitution until recently, has, in spite of the early fears of its jurists, led, perhaps, all of the States in the ability, character, and fundamental soundness of its courts.

Now that the same issues are again under discussion which were so brilliantly discussed in the Massachusetts Convention of 1820, it is but natural that leaders of the bar and bench to-day, like the leaders in the Massachusetts gathering of nearly a century ago, should become much exercised lest the Massachusetts doctrine, if applied and extended in State constitutions, might do great violence to essential elements in our judicial system. Even though the "judicial recall" is unnecessary, and may be unwise, it is difficult to read American constitutional history and still believe it would prove in fact as dangerous and destructive as many persons are now contending.

VI

THE POWER TO HOLD LEGISLATION UNCONSTITUTIONAL

That judicial misconception of "the great public needs" should be made the occasion for taking away the power of the courts to declare legislation "unconstitutional," is not a proposal now before the people as a political issue. Until the recent proposal of Mr. Roosevelt, however, there was a growing belief on the part of students of jurisprudence that the State courts would cease to be a barrier to social progress only if, and when, their power to nullify legislation was taken away. There are few students of comparative jurisprudence who have not believed this to be the ultimate course. Men of the type of Dean William Tricklett, of the Dickinson Law School; Chief Justice Walter Clark, of North Carolina; Professor Alfred Hayes, Jr., of the Chair of Comparative Jurisprudence at Cornell University; Professor Roscoe Pound, of the Harvard Law School; and many others of a scholarly familiarity with our constitutional system and its antecedents,

apparently have seen no solution short of some drastic step. They point out that the principle of judicial supervision of the legislature came to America from England, where it existed under a government of "fused" rather than "divided" and co-ordinate powers; that even in England, it never meant any such judicial powers or related to any such matters as in the United States to-day; and that even in England it was soon abandoned and the present rule of popular and parliamentary omnipotence substituted, under which no one would suggest that the cherished constitutional guaranties of Magna Charta have been broken down in the land which gave them birth, or that property or private enterprise have been rendered unsafe.

The matter, from an historical point of view, has never been better summarized than by Professor Charles Howard McIlwain, Thomas Brackett Reed Professor of History and Political Science at Bowdoin College, in his monumental work on "The High Court of Parliament and its Supremacy: An Inquiry into the Boundaries between Legislation and Adjudication in England," in which he says,[1] as to the American judicial system:

> The "legislative" activity of our courts to-day is a fact that is rightly attracting great attention

[1] Pages viii, xi, xii.

at the present time. . . . It is a subject of the utmost consequence. . . . The great powers now exercised by our courts (are) greater here than in England, because the like tendency was there checked by the growth in the seventeenth century of a new doctrine of parliamentary omnipotence. . . . If my study has shown that the present-day extension of judicial action in America has grown out of conditions in the England of an earlier day, it has shown another thing no less clearly—namely, that the government of Tudor England was a government of *fused* powers (while that of the United States to-day is a system of separated powers), and, therefore, that the former activity of the judges in England was due to a *fusion* of govermental powers, not to a *division* of those powers. The extent of "judicial" activity under such conditions is a very dangerous precedent, if it is to be followed slavishly and applied without discrimination to a system in which there is a balance between *divided* powers, where an encroachment of one department upon another may endanger the balance and threaten the whole. It is not fitting that the legal historian should follow precedent to such an extent as in all cases to justify the legal rules, merely because he finds for them an unbroken history or even a former usefulness.

In the *American Law Review*, in 1906, Dean William Tricklett of the Dickinson Law School, brilliantly stated[1] the view of those who hold with

[1] "Judicial Dispensation from Congressional Statutes," *American Law Review*, vol. XLI, page 65.

him that the courts must be stripped of their power to hold legislation "unconstitutional":

It is necessary to complete the work of due coordination of the various arms of the government, by the abandonment by the judges of their usurped power of paralyzing the legislative organ by refusing to carry out its legislation, and by enjoining officers and others from carrying out that legislation. The legislators are elected to speak, and usually speak the people's will. The people will never be masters in their own house so long as a majority of nine gentlemen, pretending to have Marconigrams from the defunct men of 1787 and 1788 concerning their meaning when they adopted this or that phrase of the constitution, arrogate to themselves the power of veto, and not merely refuse to aid in the enforcement of statutes, but even launch prohibitions against the carrying out of these statutes by those who, unhindered by them, would legally execute them.

Until the legislative organ regains its lost legistive supremacy, the intentions of the enacters of the constitution are defeated, and the living people's will is thwarted by what five men out of 100,000,000 choose to declare the will of those who have been dead for one hundred and twenty-five years.

This striking excerpt from the writings of Dean Tricklett by no means establishes, however, the taking away of the power of the courts to hold legislation "unconstitutional" as the wise or necessary means for preventing the judicial obstruc-

tion of the popular will which he has depicted. On the contrary, it would be a misfortune in the minds of the most sagacious of American statesmen, if the problem that has been pointed out should lead to so radical and dangerous a step as the taking away from our courts of all power to enforce compliance with the written constitutions. In the interpretation and application of specific provisions, the compelling of a careful legislative and popular consideration of innovations in legislation, and the enforcement of a reasonable conformance to fundamental standards, the courts have an honorable and useful function under our federal system. *If it were necessary* to take away this power of the courts over legislation as the only practicable means of removing existing barriers to social progress, nothing else could be expected than that this nation would ultimately follow in England's footsteps in this respect, and curb here the authority of the courts just as was long ago done in England. Fortunately it does not seem necessary to go so far; but the serious question still remains whether, in the event there is not now adopted an effectual measure of conservative and constructive implications, to-morrow's action may not be more drastic and sweeping than the situation really requires.

VII

DIRECT POPULAR RE-DEFINITION *VS.* GENERAL CONSTITUTIONAL AMENDMENT

If our inquiry has led to the conclusion that, rather than remove the judge from office or strip the courts of their constitutional functions, we should simply give to the people the ultimate determination whether a particular act comes within the scope of the "police powers" of the State, and accordingly, whether the "due process" clause as interpreted by the court shall, or shall not, stand permanently in the way of desirable "welfare legislation," there remains to be considered the question of method. In what manner shall the popular will be made the ultimate arbiter of the regulative powers of the State? Important as is, at present, the decisive re-establishment of the *principle* of ultimate popular control, now assailed and rejected in some quarters, as we have seen, it is no less important that out of the discussions of the bar and the deliberations of the people there should be evolved the adoption of *the most suitable method.* Believing firmly in the

principle, the writer is glad to join in discussing the *method*.

As we have seen, there are two suggestions in this respect:

(1) The method of constitutional amendment, *i. e.*, the adoption, by a direct vote of the people, of an *addition*, in necessarily general terms, to the "due process" clause in the State constitutions, to the effect that the enforcement of this or that *class* and category of legislation shall not be prevented, in spite of the "due process" clause and the court's decision that such legislation does violate that clause.

(2) The method of referring directly to the people the determination whether *the particular act* is, in *fact*, within "the great public needs," and within the sanction of the "prevailing morality" and "strong and preponderant opinion," and *so not in conflict* with the "due process" clause.

Under either method, the "reversal," "review," or "setting aside" of the court's "decision" is done by a direct vote of the people at an election. Under the first method, they declare that "due process" *shall not* prevent the legislation in question; under the second method, they merely declare that "*due* process" *does not* prevent it. The latter proposal, miscalled the "recall of judicial

decisions," and not much more accurately called the "popular review of constitutional decisions under the 'police power,'" is that advanced by Mr. Roosevelt, first in magazine articles and his address before the Ohio Constitutional Convention at Columbus,[1] and later in his Carnegie Hall address in New York City[2] as a candidate for the presidential nomination of his party, and in a number of less formal and sustained addresses in other parts of the country. A more accurate characterization of the proposal, as we shall see, would be as "direct popular re-definition of the scope of the 'police' or regulative powers of the State," or as letting the majority vote as to what is essentially a matter of the mature majority opinion.

Needless to say, the process of constitutional amendment may be made so complicated and protracted as to afford no expression of the real popular will on any proposition which is opposed by any active special interests in the commonwealth, as is true of most "welfare" legislation. On the other hand, the process may be made so lax and loose as to take away the proper safeguards of full popular deliberation. The former

[1] *The Outlook*, February 24, 1912, page 365.
[2] *The Outlook*, March 23, 1912, page 618.

is doubtless the case in such States as Pennsylvania and New York, where upward of four years is most commonly required, and the latter may prove to be the case in California, where the lapse of but one year is required. The purpose of a provision that before an amendment may be voted upon by the people, it must first pass two successive State legislatures, *i. e.*, not merely in successive years, but also legislatures in which there has been a change of the personnel of the State senate as well as the more numerous branch, is, of course, to make amendment difficult and delayed, and within the control of political leaders at some point in its progress, should the amendment be opposed by those whom politicians like to assist and please. The purpose of a provision that the electorate may, by a two-thirds vote or a mere majority, in any year, adopt a constitutional amendment of which some prescribed notice has been given,[1] is, of course, to make the matter as little susceptible to political or financial control as possible, and to enable the voters to write into their State constitutions provisions usually and properly contained only in statutes, but which the people wish to place beyond the power of the State courts to nullify or impair. California and

[1] This is known as the "Constitutional Initiative," *i. e.*, the amendment may be *initiated* by the people, without prior formulation by the legislature.

some others of the Western States have done this, notably as to their provisions for public regulation of public utilities, since by writing the basic provisions of such regulation into their State constitutions, the power of the State courts to pronounce adversely upon them is taken away, and they are left only to the ultimate scrutiny of the Supreme Court at Washington. It is this situation which makes some of the more recent State constitutions resemble an edition of the consolidated statutes rather than a declaration of the organic law and the frame of government; and where this course is pursued, it is necessary that amendment shall be facile, and it becomes only natural that sweeping changes in fundamental law are made with a minimum of popular deliberation.

Neither too long and complicated nor too short and hasty a process of amendment can be accepted as a fair or satisfactory embodiment of the constitutional amendment method, even as to the situations to which it is fairly applicable. In many of the States where the courts have, as Mayor Gaynor phrased it, "tried to apply their legal rules of thumb to social, commercial, and economic matters, . . . generally with injury to industry, commerce, and the social good," the amendment method has, it will be conceded, very

commonly broken down and proved a broken weapon in the hands of those who sought thereby to reinstate the popular will. In few of the instances, already referred to in some detail, where statutes by way of regulation of the conditions of labor have been nullified by the courts of the State of their first enactment, but upheld in similar or identical form in another State, and then by the Supreme Court, has it ever been brought about that the constitution of the first State was amended so as to permit of such legislation. It is just because the amendment method has proved so ineffectual, *in practice*, in many or most of the States, that those who oppose legislation "interfering" with their "right to run their business as they please" are so aroused and angered at the suggestion of a method which introduces, perhaps, no new *principle*, but would almost certainly be more effectual in *practice*. The advocacy of a practicable method has now forced many persons into the open, in confessing that they did not really believe in what it had, *in theory*, already and always been *possible* to do, by way of overcoming an adverse judicial decision concerning "welfare" legislation.

A distinction should be noted between the amendment method, as utilized in instances

where "specific" constitutional provisions have been interpreted, probably correctly and according to both their letter and spirit, by the court, and the same method when invoked as to decisions under the "due process" clause. In the former class of cases, the people have, through their constitution, laid down an explicit and probably altogether definite rule of governmental action, and the court has refused to enforce only an expression of the legislative will which runs counter to the clearly expressed will of the people. In such cases, if the people wish to reinstate the measure enacted by the legislature, they can do this only by first repealing or amending the provision of the fundamental law which stands in the way. The situation where the "due process" clause has been held to be the sole constitutional ban upon the act of legislation in question is very different. The people then have never declared or voted upon any explicit or definite rule of action and policy as to the subject-matter of the act. They had no such situation, nor any particular or definite situation, in mind when, a hundred years or more ago, they adopted a constitution which carried over the "due process" clause from Magna Charta. In approving this clause they meant simply, as we have seen, to prescribe that life, liberty, and property should not

be "taken" except by procedure and for causes which do not violate the fundamental ideas of fairness and justice as held by the prevailing sentiment among Anglo-Saxon peoples. This meant one thing when Magna Charta was wrung from an unwilling monarch; another, when the ignoring of it was a cause for the complaint of the early colonies against the British King; still another when it was written into the Federal constitution as a national prohibition upon the legislative activities of the States at the close of the Civil War. Therefore, when a court has, under the shelter of this non-explicit clause, ruled that a given act contravenes *its* conceptions of the prevailing moral standards as to what the State may properly do in the premises, the need is not for any *repeal* or *amendment* of the "due process" clause as a means of correcting the court's misconception. The adverse decision and the popular desire to reinstate the act held "unconstitutional" by virtue of this clause do not call for any change in the fundamental law; they do not properly give rise to any sentiment for the repeal or the changed wording of the clause; and a condition under which such an amendment is the only available means of reinstating the popular will is as unnecessary as it is unfortunate. All that is *requisite* under a proper method of pro-

cedure would be a concrete and paramount expression of the "preponderant opinion" of the community, that the act in question *does not* violate fundamental and prevailing ideas as to what is "immediately and greatly necessary for the public needs," for such an expression of the social opinion is entitled to correct and overcome the court's original view as to what that opinion was, and then there would be no need for any amendment of anything. All that is really essential, therefore, is a substitution of the deliberate popular will for the court's "guess," and while this *can* somewhat clumsily be done by the amendment method as well as by the alternative method under discussion, it is to be noted that the questions arising by virtue of the "due process" and "police power" provisions stand on a different footing than those involving "explicit" constitutional provisions, so far as the availability of the amendment method is concerned.

The relative advantages of Mr. Roosevelt's proposal, as compared with the "general amendment" method, are discussed in detail in a subsequent chapter.[1]

[1] Chapter XI, page 139, *et seq.*, *post.*

VIII

MR. ROOSEVELT'S PROPOSAL DEFINED AND ILLUSTRATED

Taking the "general amendment" method as it is, however, or even at its best, are there any considerations which lead properly to the belief that, in the case of "welfare" legislation as affected by the "police power" limitation, the proposal identified with the name of Mr. Roosevelt is *a more conservative and suitable method*—not an *easier* method, but a more *sound* method, not a more *sweeping* method, but a more *adaptable* and *well-restrained* method? Is it not already clear that there are?

Mr. Roosevelt first used the incidental phrase, "the recall of judicial decisions on constitutional questions." As he explained in a letter to the writer, "I used this phrase to show that nine times out of ten, when men talk about recalling a judge, what they were really concerned about was his decision on a certain constitutional question." From the point of view of the early understanding of the real character and merits of the proposal, it is doubtless unfortunate that it

did not have the usual period of "laboratory" and academic formulation and consideration before it was flung into the forum of politics. That is the more usual history of suggestions for constitutional change, and such a preliminary consideration makes clear all the implications and furnishes the basis for a more sound and fair discussion than takes place when such a proposal makes its advent under political auspices. It may even have been unfortunate, though surely not from the point of view of its early popularity and ultimate adoption, that its public advocacy was launched by a leader in the political sphere. That has hardly tended to make the opponents of his personality fair or considerate of his proposition. But is it not also something of a reproach to the American bar and to its traditional position of leadership in all that pertains to our frame of government, that the most important proposal for constitutional change which has been made since the close of the war between the States should have been first brought to general public attention by a layman, and was at first dismissed with snap-judgment by many of the leaders of the bar?

The incidental phrase in Mr. Roosevelt's original article[1] on the subject was seized upon as a

[1] *The Outlook*, January 6, 1912, page 40.

catch-phrase for a magazine cover, and the phrase has persisted. From a legal point of view, a more unfortunate, inaccurate, and misleading characterization could hardly have been devised. If not all, at least nearly all, of the vigorous denunciation which the proposal has received from fair-minded members of the bar, and citizens generally, has been due to this unfortunate phrase and to a failure of such persons to examine the proposal with care, after the disapprobation which the initial characterization inevitably aroused.

It is well, therefore, to preface a discussion of the *method* with a statement of just what it *is* and what it is *not:*

1. *It has nothing to do with the United States Supreme Court or its decisions.* It is, in fact, only an effort and a means to bring laggard State courts of ultimate appeal up to the progressive standards set by the nation's great court. If you do not agree with those standards, your quarrel is with Chief Justice White and his colleagues, and not with Colonel Roosevelt or Dean Lewis. The question whether there is any logical reason why the method should not be ultimately applied also in the Federal sphere will be discussed in another chapter.[1] Nothing of the sort has been proposed, however.

[1] Chapter XII, page 156 *et seq., post.*

2. *It would in no way weaken or impair the interpretation or enforcement of the guaranties of the Federal constitution according to the meaning thereof declared by the Supreme Court of the United States.* The Federal constitution (XIVth Amendment) provides that "No State shall . . . deprive any person of . . . property without due process of law." That is just what each State constitution provides that the State shall not do. If the "due process" clause were stricken from every State constitution, no State would thereby be enabled to "take" the life, liberty, or property of any person without "due process." Of course, if any legislation held "unconstitutional" by the State court under the "due process" clause was also deemed "unconstitutional" by the Federal court of national appeal, it could not be enforced, either through the adoption of a "general amendment" to the State constitution or the alternative method under discussion. The proposal therefore relates only to instances in which a State court lags behind the Federal Supreme Court in its conception of the permissible scope of "welfare" legislation. If any corporation or its attorneys believe that the constitutional provision last above quoted would not, as interpreted by the Supreme Court of the United States, afford its property and earnings a sufficient protection under the

law, such remarks should be presented as *amicus curiæ* in the next case arising under the Fourteenth Amendment.

3. *It has nothing to do with any "specific" clause of any constitution;* that is to say, with any clause which has a definite or ascertainable meaning that does not of necessity vary more or less—properly to a large degree—with the time, the locality, and the particular conditions disclosed. It would afford the people no means of redress or mode of procedure as to any legislative act which a court had pronounced within the inhibition of any "specific" clause or any clause except the "due process" proviso. It is to preserve unimpaired the powers of the courts to interpret and enforce the "*specific*" provisions that makes it the part of wisdom now to restore to the people themselves the determination of what is called for by the "prevailing morality" and "preponderant opinion." Popular resentment against judicial misuse of the "due process" clause has been endangering the whole fabric of judicial application of the fundamental law as declared by the people in their constitutions.

4. *It would not in any way repeal or amend or destroy the "due process" clause of any State constitution,* unless it be that the Supreme Court of the United States has already repealed or amended

or vitiated that proviso as contained in the Federal document. The clause would stand just as it is in every State constitution, and be open to judicial interpretation and application just as at present, *except* that there would be the *possibility* that the people would elect to substitute, as to a particular act, the United States Supreme Court's view that the act was "constitutional" for the State court's determination that the act was "unconstitutional." That is to say, in all cases where it seemed certain or probable that the Federal view would uphold the constitutionality of the law, there would be the possible ultimate decision by the people that, *as a matter of fact*, a measure which had been rejected in the State court as a matter of *law*, should be sustained as within "the great public needs." Those who do not believe that the majority opinion of the people should have this *ultimate* power of reversal, should try to convince their own State courts, if need be, that *in the first instance* the "preponderant opinion" and "prevailing morality" should determine the scope of the regulative power in matters of governmental policy.

5. *It has nothing to do with the "recall" of judges*, except that it would do away with the conditions which may lead many of our States to adopt the "recall" of judges. Only the advent of this more

conservative and constructive proposal has checked the demand for the "judicial recall," which was making so rapid headway, even where local conditions little warranted it.

6. *It has nothing to do with the "decision" or judgment in any suit.* The common misrepresentation that Mr. Roosevelt proposes a referendum *upon the outcome of litigation* can hardly be less than deliberate. The "cover" catch-phrase, "the recall of judicial decisions," used only to carry over into the discussion of this alternative proposal the phraseology employed in the discussion of the "recall of judges," unfortunately lent itself somewhat to such a misrepresentation; but the course of some members of the bar in representing that the proposal is for "the reversal of judicial decisions by popular vote" does little credit to their candor or their means of information. The proposed "referendum"[1] would concern a statute and not a judicial decision, and the outcome would be the *ascertainment* of the decisive *fact* of the "preponderant opinion" and "prevailing morality" as to that act, and not the reversal of any judgment or decree rendered by any court. From the foregoing it of course follows that any such referendum could follow only a determination of the highest appellate court of a State, and

[1] An illustrative form is set out on page 117, *post.*

could not be predicated upon a determination by either a trial court or a tribunal of intermediate appeal.

If the foregoing defines the proposition by stating what it is *not*, we may proceed with the statement of what it *is*. In his Carnegie Hall address Mr. Roosevelt said:[1]

I am proposing merely that in a certain class of cases involving the police power, when a State court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law—which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion—be submitted for final determination to a vote of the people, taken after due time for consideration. And I contend that the people, in the nature of things, must be better judges of what is the preponderant opinion than the courts, and that the courts should not be allowed to reverse the political philosophy of the people.

In other words, the proposal is that the direct expression of the popular will be made the ultimate guide in determining what the States may do in the exercise of their "police" or regulative powers, and that this shall be accomplished by permitting the people, at a proper interval after

[1] "The Right of the People to Rule": *The Outlook*, March 23, 1912, page 620.

a State statute has been held by the State courts to be "unconstitutional" as not within the "police power," to vote directly and decisively upon the question whether *they* consider it within the scope of *their* constitution as *they* made it.

The procedure by which this would be accomplished would probably be more simple and understandable than the usual processes of constitutional amendment. A suitable provision for a referendum in this class of cases would be embodied in the State constitution. Such an amendment might, perhaps, well take the form of reading into the "due process" clause of the State constitution the language or essential holding of the United States Supreme Court in *Noble State Bank* v. *Haskell*,[1] to somewhat of the following effect:[2]

Provided, however, that nothing in this section[3] contained shall in itself be construed to prevent the enactment and enforcement of legislation which is held by the prevailing morality or the strong and preponderant opinion of the people

[1] 219 United States Reports, page 104.

[2] No attempt is made in this formulation to suggest perfected legal phraseology, or to present any views as to what percentage of the electorate shall be required to petition for or participate in the referendum vote. The purpose is only to present the substance of the plan in a concrete form.

[3] Of course where, as in New York, other provisions are combined with the "due process" clause into one section, the terms of reference to that clause would necessarily be more explicit.

of this State to be immediately and greatly necessary to the welfare of the State or the people thereof; and in the event that the highest court of appellate jurisdiction in this State shall pronounce invalid under this section[1] an act of the legislature not in conflict with any other provision of this constitution, there shall be held, if not less than twelve (12) per centum of the duly qualified voters in not less than one-fifth of the counties of the State shall so petition the legislature in writing, a referendum to the duly qualified voters of the State upon the question whether the said act of the legislature shall stand and be enforced, the decision of the court to the contrary notwithstanding, such referendum election to be held not less than one year from the date of the handing down of such decision of the said court, at the time of the general election in that year, and otherwise in such manner and subject to such regulations as this constitution and the legislature may prescribe; and in the event that at such referendum election there shall be cast in favor of the enactment and continuance in effect of the said act so voted upon a number of votes equal to a majority of the total number of voters duly qualified to take part in the general election for that year, the same shall be and continue in effect from and after the date of the canvass of the votes cast in the said referendum election, the decision of the said court to the contrary notwithstanding.

Under such a constitutional provision as the foregoing, and regulations enacted to govern such elections as therein prescribed, the question sub-

[1] See note 3, page 115, *ante*.

mitted to the electorate at the referendum election might, perhaps, take something of this form, based upon the Workingmen's Compensation Act held "unconstitutional"[1] in New York State:

Shall the act of June 25, 1910, commonly known as the Wainwright Workingmen's Compensation Law, entitled "an Act to amend the Labor Law, in relation to workingmen's compensation in certain dangerous employments," and providing, in substance (taking in, perhaps, a very brief resume of the essential provisions of the act) be reinstated and continued in full force and effect as law, the decision of the Court of Appeals in Ives *v.* South Buffalo Ry. Co. (201 N. Y. Reports at page 271) to the contrary notwithstanding? Yes. No.

There will, of course, be advocated suggestions for something more of conservative safeguards and requirements for a longer period of popular deliberation before the vote is taken, and there will also be heard suggestions that the foregoing would be too dilatory a procedure. Judge Peter S. Grosscup, former presiding Judge of the United States Circuit Court of Appeals for the Third Circuit, in an able letter[2] in advocacy of this "referendum" proposal, includes in his statement thereof a requirement that the matter should be submitted to the people only if the act held "un-

[1] Ives *v.* South Buffalo Ry. Co., 201 New York Reports, page 271.
[2] Pages 122 to 125, *post.*

constitutional" by the court shall be repassed by the legislature. It is not at all the purpose here to pass upon the merits of any of these suggestions as to method, or to justify the details of the concrete provisions above formulated, or even to formulate the most desirable mode of procedure. The foregoing is offered by way of illustration merely.

IX

THE TESTIMONY OF EXPERTS AS TO PRACTICAL ADVANTAGES

Some men are writing and talking as though there was something in this "referendum" proposal which should startle the masses at their meals. It is deemed something novel, radical, unprecedented, unsupported except by an ambitious layman who seeks the presidency, and by such of his supporters as are willing, because of a belief in the general sincerity and soundness of his political activities, to overlook his advocacy of this proposal. This volume has no concern with the matter as a political issue, or with its effect upon the political or personal fortunes of individuals. The outcome of any political contests of the present year, or the present decade, cannot accomplish the adoption of the proposal in a majority of the States within that period. Constitutional changes do not come so quickly. On the other hand, no amount of popular misunderstanding or disapproval at the present time, and no political success or defeat of any of its advocates, can per-

manently determine the ultimate judgment of the people thereupon.

The charge that the proposal has only political and non-legal advocacy makes it proper, however, that a detailed discussion of this method of procedure, as compared with that of the general amendment of the "due process" clause, should be preceded with some reference to what has been said in its behalf by those outside the influence of party or factional politics. Quotation may first be made from the statement of a trained and impartial observer, Dean William Draper Lewis, of the University of Pennsylvania Law School, who long has been a sound teacher of the law and a sagacious counsellor in the formulation of much progressive legislation. Following Mr. Roosevelt's Columbus speech, Dean Lewis said, through the newspapers of Philadelphia:[1]

To a lawyer, the most interesting suggestion Colonel Roosevelt has made is to allow the people, after consideration, to re-enact legislation which a court decision has declared is contrary to some clause in the existing State constitution.

Any one who has been asked to draft specific amendments to State constitutions will hesitate to condemn, without serious consideration, the

[1] See also an address entitled "The 'Recall of Judicial Decisions' on State Constitutional Questions," by William Draper Lewis, at The Aldine Club, New York City, printed in an amplified form in the *Annals of the American Academy of Political Science*, 1912.

suggestion made by Colonel Roosevelt. To take a concrete instance: the New York Court of Appeals declared the Workmen's Compensation Act, passed by the New York legislature, as depriving in its operation the employer of his property without due process of law. A number of amendments to the New York constitution, designed to validate a compensation act, have been drafted, and it is not unlikely that one of them will be adopted. Personally, one or more of these amendments having been shown to me, I cannot but feel that constitutional amendments designed to meet particular cases, run the danger of being so worded as to produce far-reaching results not anticipated or desired by the people. Colonel Roosevelt's suggestion avoids this difficulty and danger. If a persistent majority of the people of New York State want a Workmen's Compensation Act, they should have it. But, in order to obtain it they should not be driven to pass an amendment to their State constitution, which may have effects which they did not anticipate or desire. Let them pass on the act, as passed by the legislature, after a full knowledge that their highest court has unanimously expressed its opinion that the act is contrary to the constitution which the people at a prior election have declared to be their fundamental law.

I may not always approve of what the persistent majority wants. I might sometimes think the measure unwise. But that doesn't alter the right of that majority to enforce its will in government. The Roosevelt idea, it seems to me, supplies an instrument by which that majority can enforce its will in the most conservative way. It makes explosions unnecessary.

I would have been very proud to have been the author of that plan, although I want to emphasize the fact that it involves no new principle, only a new method.

Dean Lewis closed his statement with the expression of the personal opinion, held by him at that time, that it was unfortunate that "this great idea" should have been first proposed by anyone so active in the political world.

The "next witness" summoned may well be the former Presiding Judge of the United States Circuit Court of Appeals for the Third Circuit, a jurist of long experience and a brilliant student of our constitutions, the Honorable Peter S. Grosscup, of Chicago. In a letter dated April 2, 1912, he first stated his point of view as to the pending political contest and the relation of the same to the constitutional question under consideration:[1]

As I told you, I am not in this primary campaign at all—neither for Roosevelt nor for Taft. But I do not like to see either misunderstood, and certainly not purposely misrepresented. On what is now known as the "recall of decisions" Mr. Roosevelt is, it seems to me, greatly misunderstood—at the beginning I, too, misunderstood him—and is beginning to be purposely misrepresented. That is unfair.

With this preliminary statement, Judge Grosscup proceeded with an illuminating discussion of

[1] Letter to Mr. Medill McCormick, dated April 2, 1912.

the proposal under consideration. Some of his characterizations, and perhaps to some extent his view-point, as to the nature and basis of the plan may not be accepted; but his testimony to its desirability, in the light of his long judicial experience, may tend to relieve it of the imputation that it finds support only in a longing for political innovation and adventure. He said:

> The truth is that what Mr. Roosevelt proposes is . . . not "recall of decisions", nor "interpretation by the people" of the constitution, nor "appeal from the courts to the mob," nor "decision by town meetings." The function of the court is to decide; to invade that function would be more or less revolutionary. But the function to make and unmake, alter and amend the constitution under which they live still remains with the people; to impair that function would be equally revolutionary. What Mr. Roosevelt really proposes is that the people shall exercise a method of altering and amending their constitution more adaptable than the one now in vogue—not an easier method but a more adaptable method.
>
> Let me illustrate what I mean with the New York Workingmen's Compensation Act. The constitution contains the clause that life, liberty or property shall not be taken except on "due process of law"; that prohibition is one of our wisest constitutional guaranties. The Court of Appeals held that the Workingmen's Compensation Act was in effect a taking of property without "due process of law"; that was a concrete instance where this wise constitutional guaranty worked

out a public misfortune. To strike out the constitutional provision entirely by an amendment would not do—that prohibition has too important a function to perform in the regulation of men's affairs in society to be stricken out. But to permit that prohibition to stand as a bar against such acts as the Workingmen's Compensation Act is something else not right—the Workingmen's Compensation Act has also a too important function to perform in the regulation of men's affairs in society, to be stricken out as "unconstitutional." *Let both stand*—that is the ideal solution. And to do *this*, let an act such as the Workingmen's Compensation Act, when found to be unconstitutional as the constitution now stands, be resubmitted to the legislature, and, if repassed, be submitted to the people at some subsequent election (the precise formula of altering or amending the constitution as now provided) whereupon, the people having so voted, the constitution stands *so amended* that the given act of the legislature submitted, and such amendments or alterations of the same as come within its original scope, *become constitutionally excepted from the prohibition*—the constitutional prohibition in all other respects standing as before. This is not "interpretation," nor "recall of decisions," nor any "decision" at all, in the judicial sense of the word, but "alteration" or "amendment" of the constitution within the time-honored function of the people to alter and amend, and within, too, all those precautions for deliberation usual to such propositions to amend. Indeed, in substance Mr. Roosevelt's proposition is nothing more than a *method of adjusting the constitution to the needs of the people as they arise, without interfering with*

its wholesome guaranties in any other respect, and will some day, I believe, be accepted as a better way of re-adapting our constitution to the needs of the times than by wholesale amendment.

With these quotations from acceptable authority, we may inquire as to some of the advantages of Mr. Roosevelt's proposal, in itself and as compared with the "general amendment" method.

X

MR. ROOSEVELT'S PROPOSAL AND THE TRADITIONS OF JUDICIAL PROCEDURE

The assertion is commonly made that as a matter of principle and as a matter of method, the proposal of Mr. Roosevelt is radically at variance with what may be termed the traditions and basic conceptions of judicial procedure, as obtaining in Anglo-Saxon jurisdictions. That is a fair challenge which deserves a fair reply.

Is not the ultimate popular definition of the scope of the "police power" a method strictly in accordance with the decision and doctrine of the Supreme Court of the United States? If, as Mr. Justice Holmes has indicated, the "police power" of a State should be deemed to sanction legislation, not forbidden by any other constitutional provision, which is "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare,"[1] it certainly seems proper to let the people vote as to what their preponderant opinion really is, if

[1] Noble State Bank *v.* Haskell, 219 United States Reports, pages 104, 111.

a considerable number of the electorate think that opinion has been incorrectly gauged by the court. In fact, what other way could there be of really determining what the majority opinion as to the fundamental justice and fairness of the regulative measure in fact is? We, of course, could continue to let the courts "guess" what the "preponderant opinion" is, as we have been doing, or we could take away the courts' power, as some propose, and let the legislature's initial "guess" be final; but why let anybody "guess" as to what the deliberate opinion of our people is as to something which vitally concerns them —why not let the people themselves vote and say? That is as fair to the judges as to the legislature and the people. It may be added that this proposal would seem to be quite in line with the view of the New York court itself, for, in the *Ives* case, after paying high compliment to the excellence and public importance of the recommendations of the Wainwright Commission as embodied in the Workingmen's Compensation Act under consideration, the court said:[1]

> We have already admitted the strength of this appeal to *a recognized and widely prevalent sentiment*, but *we think it is an appeal which should be made to the people and not to the courts.*

[1] 201 New York Reports, pages 271, 289.

That is what is proposed in the plan under consideration. How else could this "appeal" as to a particular act, be "made to the people and not to the courts," after the court has rejected the statute which the people's representatives enacted, and the "widely prevalent sentiment" approves?

Is not the ultimate popular determination of the "prevailing morality" and "preponderant opinion" a method in accordance with the traditional functions and procedure of our courts themselves? Historically, it has been the function of the judge to interpret and declare the *law*, and to leave to the *vicinage*, or, later, in the conduct of ordinary trials, to the jury, the determinations of questions of *fact*. Matters of usage, custom, prevailing standards, common repute, preponderant opinion, and the like, have traditionally been matters for determination by the arbiters of fact, by the persons who knew the conditions, rather than by the judges themselves. Ascertainment of these matters has never been looked upon as "decisions" upon questions of law, in the judicial sense. The interpretation and application of the "specific" and explicit provisions of a written constitution are, of course, matters of *law*. But to determine whether a particular legislative act is "sanctioned" by "*usage*" or by "the *prevailing* morality" or by the "*strong* and *preponder-*

ant opinion," or even whether it is "called for by the general interests of the community," or is "necessary for the comfort, health, and prosperity of the State," is essentially a question of *fact.* Is it not therefore appropriate, from the viewpoint of legal procedure as well as policy, to afford at least a referendum to the people as a check against possible errors by the court, in determining a matter not within the traditional or the anticipated functions of judges?

"Interpretation" of the scope of the "police power" and the prohibitions of the "due process" clause, thus stands on a different footing than other "constitutional" questions, and the propriety of a popular reference to determine the ultimate fact becomes apparent. But if it be asserted that only under the most recent decisions of the Supreme Court of the United States has there been judicial recognition of these factors, "outside the four corners" of the constitutional instrument, as elements in "interpreting" constitutional provisions of this character, the refutation may be found in New York State itself. In the case of *Rathbone* v. *Wirth* (1896), decided by the Appellate Divison of the Supreme Court for the Third Judicial Department of the State, the court, by Herrick, J., with Parker, P. J., and Merwin, J., concurring, gave hearty approval to

as clear and graceful a statement of this essential doctrine as may be found in all law and literature: [1]

As has been said by one of the most eminent authorities upon constitutional law in this country, Mr. Justice Cooley, "If this charter of State government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be struck from the body of our constitutional law, a lifeless skeleton might remain; but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so-called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to give equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone." (*People ex rel. LeRoy* v. *Hurlbut et al.*, 24 Mich. 44.)

[1] 6 New York Appellate Division Reports, page 277.

Is not the ultimate popular determination of the scope of the "police power" the method which best affords a standard at once conservative and yet elastic and progressive enough to meet changing conditions and needs? Some statements in the earlier portions of this volume may have been read to be a reflection upon some of the State courts. Nothing written was in fact so intended as to any court or judge discussed, and hardly as to any particular decision. The criticism should rather be of the people and their leaders for permitting the State's powers to promote the welfare of its people to rest upon the legal precedents as to what *may* be done rather than our legislative wisdom and executive experience as to what *should* be done. As was said by Chief-Justice Baldwin, now Governor of Connecticut, whom surely none will accuse of undue "radicalism":[1] "Our Declaration of Rights speak the language and the lessons of the eighteenth century." *The people* have left the courts to go on trying to interpret twentieth-century needs in the terms of eighteenth-century precedents and principles, and then some persons violently censure the *courts* because they have not been able to support all present needs by "ancient" precedents "in existence when our

[1] "The American Judiciary," by Simeon E. Baldwin, page 375 (1905).

constitutions were adopted"! The public needs as to social legislation should not be matters of *legal precedent* at all—they depend on *conditions of fact* which change with the time, the locality, the industrial or economic environment, the conscience and moral standards of the people, their habits of life and thought, and a thousand other factors as complex and variable as American life itself. Yet we expect our courts to support and justify all these by the "ancient" precedents "which were in existence when our constitutions were adopted," as the New York court said, and we would criticise our courts if they do not succeed with reasonable agility!

The principle is wrong. Enlightened public opinion, and not dry legal precedents from the tomes, should be chart and compass in determining the bounds of our regulative legislation. We cannot regulate modern gas and electrical corporations by decisions rendered in the days of the tallow dip; we cannot adequately control four-track steam railroads merely by the law of the stage-coach and the public inn; we cannot be content to have our labor legislation forever checked and thwarted by the decisions of a few men out of the many, and those few, not men of to-day, accountable in any way to their fellows, but dead men, who lived in the days when manu-

facture was carried on only in wholesome towns and villages, on a small scale and without modern "division of labor"—in fact, when few persons even *cared* whether women worked long hours, or little children toiled in mines, or workers breathed deadly fumes as they worked. "Ancient" precedents "in existence when our constitutions were adopted"? Of course, if we try to find in 1770 precedents to "sustain" 1912 legislation as to "sweat-shops" or "underground bakeries" we will not find any, for there were no "sweat-shops" or "underground bakeries" then, and no one would have cared or tried to pass laws about them then if there were. Clothing, even in New York City, was then made only by the housewife at her loom near the fireplace or by the "gentleman-tailor" in the little shop in which he alone worked. "Sweat-shops" were unheard of, labor unions as at present constituted did not exist, bakeries below ground were unheard of, street railroads and subways were undreamed of —yet the rule of precedent in "police power" matters means the constant attempt to apply this inadequate yardstick. And present conditions will change, probably, just as much or more in a similar period of time. It would be as unsafe and unjust to adopt the precedents and prevailing social standards of to-day as binding upon to-

morrow. Are the decisions of our judges as to what was needed yesterday or to-day to harass good men and women always? If we amend the constitution every time a controlling precedent stands in the way of meeting a present need, we have not met the situation. The language of to-day's amendment to the "due process" clause may not at all suit to-morrow's condition, but may prove a worse barrier or a more serious source of injustice to-morrow. Is it not better simply to let the clause stand, and let the people vote whether a particular statute deemed necessary to-day shall be enforced in spite of the court's view that a reasonable conception of "due process" inhibits the enforcement of the act? Then, if changed conditions call for some different policy a score or fifty years hence, the same course is open, and no limitations of an amendment that could not foresee all possible future conditions has been set up.

Of course, if the scope of the "police power" is determined by "the great public needs," or "the general interests of the community," or "the prevailing morality and strong and preponderant opinion," it is clear that the domain is one for ultimate popular discretion rather than the rule of bench-made precedents. If it be suggested that too much emphasis has been placed upon the Federal definition of the "police power," it remains to

point out that even under the most circumscribed of State definitions the question whether a particular measure is reasonably calculated to conserve the public health, safety, or morals is a question not of *law*, in the sense of legal doctrines or principles, but of *fact* under the particular conditions to which it applies. What is required by the public health, morals, and safety varies with the locality. A tenement-house act might seem absurd in Arizona, a statute regulating the grazing of sheep might seem absurd in Greater New York. Or it may vary with the time. A law regulating the hours of labor in canneries would have been laughed out of the legislature or the courts seventy years ago, for the housewife did her own canning in the wholesome conditions of her own kitchen; yet such a statute may be very necessary under the conditions now obtaining, for example, in the fruit-growing regions of central New York. Who knows better about that—the judges or the people? Judges are chosen because they are upright and know the law, not because they know or can ascertain, when they are sitting in a busy appellate court, whether unclean and tubercular conditions in underground bakeries could affect the bread after it is baked. We do not stipulate, as essential qualifications for election or appointment to the judiciary, that

candidates shall have first-hand familiarity with industrial or economic or social conditions and phenomena, but with the law. We do not select our judges because of a belief that they have the soundest notions of governmental policy and statesmanship—men with these qualifications are designated to legislative or administrative positions. Is it not all wrong to require, or permit, our judges to pass upon such matters, in the guise that they are thereby dealing with questions of law? Was not the New York court right in declaring that the appeal for a broad and progressive scope of the "police power" is "an appeal which should be made to the people and not to the courts"?

If it be suggested, however, that this disavowal of the doctrine of *stare decisis* as to matters of the regulative powers of government is novel or unprecedented doctrine, reference may be made to the opinion of Mr. Justice Moody in the Employers' Liability Cases,[1] in the Supreme Court of the United States, the eloquent opinion of Mr. Justice Cooley,[2] in the Supreme Court of Michigan, the opinion of Mr. Justice Mathews in the celebrated case of *Hurtado* v. *California*,[3] also in the Supreme Court of the United States,

[1] 207 United States Reports, page 463.

[2] People *ex rel.* Le Roy *v.* Hurlbut, *et al.*, 24 Michigan Reports, page 44; quoted at page 130, *ante*.

[3] 110 United States Reports, page 516; quoted at page 60, *ante*.

and to the learned opinion of Chief-Justice Winslow, of Wisconsin, one of the greatest of American judges, upholding as "constitutional" a Workingmen's Compensation Act, in the course of which he said:[1]

A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third; the race moves forward constantly and no Canute can stay its progress.

When an eighteenth-century constitution forms the charter of liberty of a twentieth-century government, must its general provisions be construed and interpreted by an eighteenth-century mind surrounded by eighteenth-century conditions and ideals? Clearly not. This were a command to halt the race in its progress, to stretch the state

[1] Borgnis, *v.* The Falk Co., 147 Wisconsin Reports, page 327, at page 348, *et seq* (1911). That this doctrine is to be deemed to apply only to "due process" and "police power" determinations, see, especially, concurring opinions of Marshall, J., and Barnes, J.

upon a veritable bed of Procrustes. Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential factors in the settlement of problems of construction and interpretation.

These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions and difficulties resulting therefrom is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument.

XI

THE CONSERVATISM AND PRACTICAL ADVANTAGES OF THIS METHOD OF "POLICE POWER" DEFINITION

The question for which every reader will expect to find a direct and definite answer in this volume may be stated thus: "What, if any, are the actual and substantial advantages to be gained by the adoption of Mr. Roosevelt's proposal as compared with reliance merely upon continued efforts to utilize the present method of 'general amendment' to accomplish the same legislative ends?" That is a fair question, and it is a question by which the advocates of the method under discussion could afford to stand or fall. In a previous chapter[1] it has been pointed out that the "general amendment" method has very commonly broken down in practice and, in not a few cases, has proved a weapon which the people were either unable or reluctant to use, even to accomplish ends which decisive and persistent popular majorities have desired. In other instances, constitutional amendments have been adopted, in the

[1] Chapter VII, page 98, especially at page 100, *et seq.*, *ante*.

interests of particular legislation, and the electorate has subsequently found that the action taken was altogether too sweeping or that wholly unforeseen results had followed from judicial interpretation of the language of the "specific" provision adopted. Has Mr. Roosevelt's proposal anything to offer? If sound in principle, can it also be justified as more *suitable* than the "general amendment" method as applied to cases involving advanced economic legislation, and therefore both more conservative and more effectual?

Is not direct popular determination that a particular act is within the "police power" a more conservative method than the amendment of the constitution in general terms to accomplish that concrete result? As has already been pointed out, the use of the amendment method, where the phraseology of the constitutional provision no longer represents the majority opinion, is one thing; the attempted utilization of the same method in "police power" and "due process" definition is quite another; for, as the United States Supreme Court well declared, "the police power is, and must be from its very nature, incapable of any exact definition or limitation." In the one class of cases it has been the letter of the law, the explicit enactment of the people in their last declaration of fundamental law, that stands in

the way of desired legislation, and accordingly it follows that the phraseology of the existing constitutional provision may best be changed by amendment or repeal. In the other class of cases it has been, not the wording of the constitutional provision, but the political philosophy, economic creed, social standards, and breadth of view-point of the particular judge or judges that has barred the way to the desired legislation; the people have no desire or need to repeal or amend the "due process" clause, but only to accomplish the substitution of the prevalent standards for the incorrect conceptions of the judges. That is why the method of adopting amendments in general terms to cure judicial misconceptions under the "police power" may be said to be unsuited to the actual needs of such situations—any means of dealing merely with the particular act and the particular misconception in relation thereto would seem to be more suitable and, at the same time, entirely sufficient. Would not the latter method be also the more conservative and the less sweeping and the less drastic?

If a State court now rejects under the "due process" clause a statute which the Supreme Court would uphold under that same clause, those interested in the reinstatement of the act set about securing a constitutional amendment, to be sub-

mitted to the people after a specified period of deliberation, for adoption or rejection by a majority vote of the electors taking part in the "referendum" thereon. For example, if the State court of ultimate appeal holds an eight-hour law for bakeries "unconstitutional" for the reason that it violates the "due process" clause and no other, the trades-unions of bakers and the civic organizations interested in the welfare of workers in bakeries, and other interested persons, proceed to have the people vote upon the addition of an amendment that "nothing in this section contained shall prevent the enactment of laws regulating the hours of labor in industrial or manufacturing trades and employments." Or, if an employers' liability or workingmen's compensation statute is rejected, the trades-unions, the civic organizations, and progressive employers of labor set about, through their attorneys, securing the popular adoption of a constitutional amendment that "nothing in this section contained shall be construed to prevent the enactment" of employers' liability or workingmen's compensation legislation. If such an amendment is adopted by the majority of the voters taking part in the "referendum" upon the proposed amendment, the act originally held "unconstitutional" is reenacted, in the same or such modified form as the

legislature may see fit. But what has been done? At least three things:

First.—The way has been cleared, not only for the re-enactment of that particular act, but also for the enactment of *any other act dealing with that subject.* That is to say, the legislature may thereupon enact any other act regulating the hours of labor; for example, an act prescribing an *eight*-hour work-day or a *six*-hour work-day, or an act regulating the hours of labor in trades other than bakeries, or in all trades and employments. Or, if the amendment dealt with workmen's compensation or employers' liability for injuries to employees in the course of their employment, the way is thereby cleared for *any kind* of an employers' liability or workingmen's compensation law, drastic and objectionable though it may be. Judicial rejection of a wisely drawn and conservative law may thus let down the bars for what is foolish, crude, and fanatical. And as to any such new law, the State courts could not say a word; for, after a constitutional amendment saying that the court shall not construe the "due process" clause to prevent that *class* or *category* of legislation, the court's power to do or say any restraining word is gone, and the legislative will has become omnipotent without any direct expression of the popular will, except on the ques-

tion whether there should be *some sort* of legislation of that character. In voting on the general amendment, the people doubtless had in mind the particular law, but in order to enable its reinstatement, the amendment method requires them almost necessarily to let down the bars altogether to any sort of a law of that general class and subject-matter. That will be just the potential, and not at all improbable, effect of the approaching popular adoption in New York State of a constitutional amendment[1] to overcome the result reached in the *Ives* case as to a workingmen's compensation law. The amendment was drawn with care by some of the ablest of the American bar, with the eyes of the country upon them; yet an examination of the phraseology of this proposed amendment, as quoted in full later in this chapter, will disclose that it certainly would take away all the power of the New York courts to interpose any bar or barrier to any sort of workingman's compensation legislation an erstwhile legislature might enact, socialistic and foolish, crude and unjust, unscientific and unworkable though it might be. The law drawn by the Wainwright Commission appointed by Governor Charles Evans Hughes was concededly most skilful and fair and scientific in its provisions; it represented

[1] Pages 146 and 147, *post.*

the maximum of skill in draftsmanship and soundness in substantive provisions. Yet in order to enable it to be reinstated on the statute books of the State it is necessary, under the present so-called "conservative" method, to open the way equally for the most careless and casual product of an "accidental" legislature! Another concrete instance of the same thing has already taken place in New York. After the New York Court of Appeals had declared "unconstitutional," with a great deal of uncertainty and frequent realignments in opinion, various phases of statutes regulating the hours of labor and the rate of wages on the work of municipal contractors, the people, at the behest of organized labor, cut the Gordian knot in 1905, and passed a constitutional amendment which, wisely or not, has enabled the legislature to pass any sort of laws it pleases as to the wages or hours of labor of the employees of contractors engaged in municipal work, and the courts have no power left to forbid or restrain. Does not the existing method seem somewhat "radical" and "drastic" when applied to these "police power" matters? It will be noted that the method of amending the constitution to take specified classes or kinds of legislation out of the inhibition of the constitution as construed by the court is but a *pro tanto* taking away of the power of

the courts to hold legislation "unconstitutional." Each such amendment, to meet the emergency created by a misconception as to a particular law, withdraws all the specified class of legislation from the power and function of the court to say or do anything about it except meekly to enforce it. A multiplicity of such special amendments, as in some Western States, has worked a substantial and serious impairment of what has been conceded to be the historic prerogative and useful public function of the American judiciary.

Second.—By the adoption of a constitutional amendment creating an "exception" to the operation of the "due process" clause, there has been drafted upon that great constitutional guaranty a provision of perhaps ambiguous and unforeseen meaning, which may rise up to plague the people a thousand times in years to come. An instance is the proposed New York amendment as to workingmen's compensation legislation, already referred to:

> Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers or by employers and employees, or otherwise, either directly or through a State or other system of insurance, or otherwise, of compensation for injuries to employees, or for the

death of employees resulting from such injuries, without regard to fault as a cause thereof, and for the settlement, with or without trial by jury, of issues which may arise under such legislation, or to provide that the right to such compensation and the remedy therefor shall be exclusive.

Many of the ablest members of the American bar, men like Mr. Francis Lynde Stetson, and Mr. J. Hampden Dougherty, and Mr. Joseph P. Cotton, Jr., have worked laboriously and patriotically, with the aid of some well-known judges, to frame this amendment. Perhaps no amendment to a State constitution ever received so careful and skilful scrutiny. But who can say with certainty what even this most carefully framed amendment may some day be held to permit or prevent? Even its authors do not agree as to what it would make possible, even now. Some sharp public discussions have taken place and some profound pamphlets have already been written by men closely identified with the formulation or revision of it. If that is the case now, what may some day be ingeniously worked out from its complicated and extended phraseology to apply to conditions not now projected or foreseen? Does not also this phase of the matter make the adoption of special "constitutional exceptions" to meet particular judicial mis-

conceptions appear a far-reaching and extreme method?

Third.—The adoption of a series of "constitutional exceptions" to meet particular decisions under the "due process" and "police power" clause makes the Bill of Rights in the State constitutions a patchwork of exceptions and provisos, and puts the State constitutions in the position of very solemnly saying that the "due process" clause does not mean a lot of things which the highest court of the land has held it could not possibly mean! The New York State constitution will be in just that position when the workingmen's compensation amendment above quoted has been adopted, and is already in that position as to a number of other matters! The "general amendment" method is thus unsuitable and too far-reaching as a method of determining the interpretation of the "due process" clause. After that clause declares that "no person shall be deprived of life, liberty, or property without due process of law," it seems unfortunate and incongruous to add to this historic guaranty a provision, as is now commonly being done in American States, that, in effect, "excepting, however, that this section shall not be construed to prevent the taking of the property of an employer without 'due process,' if his employee be injured in the

course of his employment," or that "excepting, however, you may nevertheless 'take the property' of an employing baker, if his bakery be underground," and so on. This creating of broad exceptions to the historic guaranty, that are written in as such upon the parchment of constitutional proviso, seems as unfortunate as it is unsuitable for the achieving of the essential ends sought. In addition, it is quite unnecessary. Yet it is commonly being said that Mr. Roosevelt's recent proposal is something drastic and sweeping, and that the usual processes of general amendment embody a conservative and prudent procedure to which the people should hold fast!

Is not the suggested mode of "referendum" upon the particular act essentially the more constructive and suitable method of overcoming judicial obstruction to regulative legislation? Under it the people would vote simply upon the particular act and not upon anything framed in general terms. The time and method of voting would be in the precise formula now in vogue for popular action upon constitutional amendments, excepting, probably, a slightly greater period for deliberation and consideration would be required before the vote was taken. The people would be required to pass opinion not, as now, upon a legal abstraction, comprehensible only to a trained mind,

if to any, and bearing no evidences of a direct or tangible relation to anything in the popular mind, but upon a concrete and particular act of remedial legislation, which would mean a definite and readily explainable thing to every employer and to every employee. Considering the form and character of most constitutional amendments as submitted to the people in American States, it is hardly surprising that sometimes more than half of the electors do not undertake to pass upon them at all. The "general amendment" method involves a battle between batteries of experts in legal terminology; it clutters the constitutions with things which should be in statues, and it fails oftentimes to present anything of direct and effectual appeal to the attention of the electorate. Does any one have doubt as to which the people of a commonwealth could more intelligently and interestedly pass judgment—Mr. Stetson's sonorous amendment,[1] or the Wainwright act which it is all phrased to make possible? Every employer would know just what the reinstatement of the Wainwright act would mean to him and his business, as to the setting aside of a fund for the compensation of injured employees. Every employee would understand just what the reinstatement of the act

[1] Quoted in full at pages 146 and 147, *ante*.

would mean to him should he be injured or killed while at work. Translated thus concretely into the terms of industrial conditions and the dollars and cents charged against the cost of the product or service and paid over to the workman or those dependent upon him, the matter would also be one which the general community, the purchaser and the consumer, could pass intelligently and interestedly upon, and determine whether the paramountcy of the public interest should be asserted to the end that these things should hereafter be. That kind of a "referendum" would be far different than summoning the voters to pass upon a legal jargon or a vague platitude.

At the same time, under this method the constitutional guaranties would not be limited or excepted from or changed from the form in which they have existed since Magna Charta. Their prohibitions would be no less general in terms. The power and function of the court in interpreting them would be preserved. There would be no *pro tanto* taking away of the power of the courts to pronounce legislation "unconstitutional," as is done by the amendment method. If, after the people had voted to reinstate a particular Workingmen's Compensation Act, for example, the legislature should enact a different and more drastic act, the court would still have all its pres-

ent power to hold this latter act "unconstitutional," to state trenchantly the considerations of law and policy against it, and to refuse it any enforcement. A full and deliberate public discussion and a popular vote thereon would then necessarily take place before the act as adopted by the legislature could be put in force, and it would be put in force then only because the people had specifically so willed it. And if, later, the conditions and the public needs changed, or the pendulum of public opinion swung in the opposite direction as to the social legislation in behalf of which the "referendum" had been invoked, the constitutional guaranty could be restored to *all* of its former inhibition by the simple process of the popular repeal of the particular statute.

Do not these considerations lead to the belief that Judge Grosscup[1] and Dean Lewis were right in saying that this is the more simple, the more suitable, and the more conservative method of dealing with the situation?

[1] Pages 122 to 125, *ante*.

XII

SOME PRACTICAL OBJECTIONS TO THIS METHOD OF "POLICE POWER" DEFINITION CONSIDERED

Several objections that are urged against Mr. Roosevelt's proposal are not addressed to any underlying principle, but relate only to the working out of the plan in practice. These objections may be briefly considered:

The objection that the plan would mean "the tyranny of a small minority." A number of well-meaning persons have taken the position that they cordially approve of Mr. Roosevelt's proposal as a matter of principle and public policy, but that they are obliged to oppose its adoption for the reason that in practice it would mean minority, rather than majority, determination. They frankly concede that the definite will of a decisive and actual majority of the voters, "deliberately formed, consistently adhered to, and fairly expressed, should determine the treatment of public affairs in all branches, even the judiciary," [1] but they fear that only a minority of the elec-

[1] *New York Times* Editorial, January 24, 1912.

torate would control the result of the popular "referendum." That objection cannot be deemed well taken. In the first place, it could properly be urged against nothing other than a loose and unscientific embodiment of the principle, so far as its actual operations are concerned. Mr. Roosevelt has at all times made it clear that he favored such provisions as would ensure the fullest popular deliberation, and the fullest possible expression of the popular will, to the end that only the well-considered decision of an undoubted majority of the electorate might be certified by the result of the referendum. It would be quite feasible, and consistent with the fundamental principle involved, that the working plan should embody such safeguards as would ensure an expression of the opinion of a clear popular majority. For example, the objection under discussion could in no way be urged against the concrete illustration of a constitutional amendment to carry out Mr. Roosevelt's proposal, which was set out in a previous chapter.[1] In the second place, there is no more implication of "minority rule" in Mr. Roosevelt's proposal than in the "general amendment" method. If anything there is less. It rarely happens, in New York State or in other States, that anything like a majority of the elec-

[1] Page 115, *ante*.

torate is polled in favor of the adoption of a submitted constitutional amendment. When voters are called upon to decide as to the merits of a constitutional amendment framed in general terms, formidable and perhaps unintelligible in its legal phraseology, and bearing no tangible relation to any measure of economic relief, it often happens that less than a majority of the electors vote upon the matter at all, and this kind of a minority vote adopts our constitutional amendments, in all but a few States. For example, in New York, under the cumbersome "general amendment" method, it has several times happened that approximately one-fourth of the voters taking part in a particular election have been sufficient to engraft upon the constitution important and far-reaching changes. Such a condition ought not to be permitted under any system of procedure, but it is at least true that the "general amendment" method has encouraged and perpetuated "minority rule," and that "minority rule" under Mr. Roosevelt's proposal would be less objectionable for the reason that only a particular statute and not the creation of a broad exception as to a class or category of legislation would be passed upon. Mr. Roosevelt's proposal would tend to do away with "minority rule," in that it would doubtless be coupled with requirements making

a decisive popular expression the essential of the effectiveness of the referendum, and also in that it would encourage general participation in the referendum by affording the voters something they could pass more intelligently and interestedly upon.

The objection that the plan is stated to relate only to State governments. Some persons object to Mr. Roosevelt's proposal because it is not made to apply to the Supreme Court and its determinations as to "due process." They think that it should apply to the Federal courts. Other persons object to the proposal because they cannot understand why it is not advocated as to the national government, although they concede that it should not be. It is simply another instance where the reasonable course seems to lie between the extremes of view. The plan is not being advocated with reference to the Supreme Court's "interpretation" of the "due process" clause for the reason that it does not seem to be necessary that it should so apply. Our people do not advocate or adopt organic changes for academic reasons only. The Supreme Court, as we have seen,[1] has adopted a reasonable and progressive standard as to what legislation is permitted by the "due process" clause, so long as no other

[1] Page 159 *et seq.*, *ante*.

constitutional provision is contravened. As to a court which itself adopts correct standards and conceives itself bound not to press "the broad words" of the "due process" clause to "a dryly logical extreme," but rather to give efficacy to "the prevailing morality and strong and preponderant opinion" as to what is "immediately and greatly necessary for the public welfare," there is less reason for suggesting a constitutional change to accomplish that very result! The advocacy of the proposal is, of course, being centred in those commonwealths where it is needed. Should there ever come to be great reason and need for its adoption in the national sphere, as means of giving effect to the underlying social conscience of the people, doubtless it would then be seriously considered in that connection. There is the further fact to be noted that the adoption of such a plan, in some or many States, would afford concrete expressions of the popular will which would be of great assistance to the Supreme Court and progressive State courts in determining the "prevailing social morality" and "preponderant opinion" as to particular classes of measures.

The objection that the plan would subject "police power" legislation to the "fitful and changing impulses of a temporary majority." What has just

been said as to "minority rule" applies with equal force in this connection. The objection could have any merit at all only if the actual details of the working plan contained no safeguards to ensure deliberate and consistent popular action. Certainly the period of popular deliberation advocated by Colonel Roosevelt is much greater than that required for the adoption of broad constitutional amendments in many States of the West. Certainly no popular action could be so "changing" as the course of judicial decision, in some commonwealths, in respect to not a few questions of law, nor as "fitful" as the "changing impulses" of some executives accustomed to deplore such manifestations in others. It is also true, as we have seen,[1] that popular needs vary with the time and vary with the locality, so that some elasticity as to the permissible bounds of "police power" legislation is essential rather than objectionable.

The objection that the plan would open the way to the adoption of dangerous and "confiscatory" legislation. The real objection of persons who oppose this proposal for insincere reasons is a secret fear that the plan would enable the adoption of a "radical" programme of ill-considered legislation. That contention might have had some public force

[1] Page 131 *et seq.*, *ante*.

ten years ago, but not now. Efforts to secure advanced legislation along economic lines are no longer "socialistic" or "revolutionary"; these efforts are not now in the hands of "the dangerous and the unsafe." On the contrary, many of the ablest men in business and many of the noblest women in American home life are giving freely of their time, and energy, and money, for the advancement of those just and proper measures of social reform which still receive judicial disapproval in some States. Only the continuance of the "general amendment" method presents any reasonable possibility that these unselfish and constructive efforts may lead to anything drastic and dangerous. To illustrate: The National Manufacturers' Association—whom no one will accuse of being "confiscatory" in its aims—has determined it to be good business policy, as well as good conscience, to do away with the old system of "negligence actions" and "claim agents," and have a scientific system of workingmen's compensation, under which the workingman or his family gets the "compensation" and not his attorneys. The association is co-operating with other agencies of public opinion in securing the enactment of reasonable and workable laws to this effect. But the association would, of course, not favor the enactment of crude, careless, and "confiscatory"

legislation, and would be reluctant to make that kind of legislation possible. In New York, however, to secure the re-passage of the fair and just act drawn by the Hughes commission, we are engaged in the taking down the constitutional barriers to *any* legislation on this subject, and the way will be cleared for the most careless and the most drastic law which a "temporary" legislative majority, with the aid of the governor, saw fit to pass. No, Mr. Roosevelt's proposal would not open the way for the adoption of dangerous and "confiscatory" legislation, but it would make it possible to put in force just and sound legislation without opening the way for the facile adoption of the other kind the following year. It affords a simple and direct way of passing concretely upon measures of social reform which press for solution; it affords the way of considering them separately, specifically, on their individual merits and without relation to anything else, and that manner of procedure is certainly "conservative" and not "radical." The "conservatives" may as well meet these issues on their merits. These measures must be met and cannot be evaded. Mr. Roosevelt's proposal furnishes the convenient method of formulating and passing concretely upon the issues of this coming contest.

XIII

MR. ROOSEVELT'S PROPOSAL AND THE FUNDAMENTALS OF GOVERNMENT

It remains to consider whether there is anything essentially repugnant to the fundamentals of republican government in this proposal that, as an ultimate or potential check upon judicial misconceptions, the deliberate determination of a decisive popular majority shall be made "the highest authority" concerning the enforcement of any desired measure of advanced economic or social legislation.

Is not the determination of such matters by the ascertainment of "the will of the ultimate sovereignty" of the people a proposal well grounded in the fundamental principles of republican government? It has been a common charge that there is being proposed by Mr. Roosevelt and those who hold with him some radical subversion of the basic principles and standards of the American constitutional system. A distinguished educator[1] has discussed this proposal, among others, in a

[1] "Why Should We Change Our Form of Government?" by Nicholas Murray Butler (Charles Scribner's Sons: 1912).

vigorous volume entitled "Why Should We Change Our Form of Government?"—as though a change in "form of government" were involved in the proposal that New York or Illinois should be enabled to do, upon a decisive and deliberate vote of their electorate, what Wisconsin or Iowa or Ohio can freely do without any such vote! Surely there is nothing novel or destructive in the conception that a question of the regulative powers of government, either concrete or general, may be referred to and determined by the ascertained "will of the ultimate sovereignty of the whole country," or that a determination of a court as to the scope of the regulative powers of government may likewise be "corrected" or "reversed" by a deliberate and decisive expression of the popular will, directly or through the representative assemblies of government. Judicial "decisions" are "reversed" in this sense very frequently, as we have seen.

The Supreme Court of the United States has seen nothing revolutionary or destructive in accepting the ascertained "will of the ultimate sovereignty of the whole country" on questions of the powers of government, even when the decisions of that court are "actually reversed" thereby. To illustrate: The Supreme Court held, early in the history of the republic, that under the con-

stitution an individual could maintain a suit against a sovereign State in the courts of the United States. This decision created "a shock of surprise"[1] throughout the land, for by the prevailing conceptions the non-suability of a sovereign State without its consent was an essential element of its sovereignty. Those who held this view appealed to the country from the court, and by the adoption of the Eleventh Amendment it was determined that thereafter the constitution should not be construed as the Supreme Court had construed it. The language of the amendment is noteworthy—"the judicial power of the United Stated *shall not be construed to extend* to any suit in law or equity," etc. This is parallel with what the people of New York are about to declare as to workingmen's compensation legislation and the "due process" section—"nothing contained in this constitution *shall be construed* to limit the power of the legislature,"[2] etc. These provisions mean nothing more or less than *definition* by the electorate; and concerning the provision quoted, when adopted as the Eleventh Amendment to the Federal Constitution, the Supreme Court of the United States said, as recently as 1890:

[1] 134 United States Reports, page 1, at page 11.

[2] The proposed amendment to the New York Constitution is quoted in full at pages 146 and 147, *ante*.

This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.

In order that there may be clearly seen the equable and approving spirit in which the Supreme Court itself referred to this explicit "reversal," by a referendum, of the "decision" it had made and the "interpretation" which it had therein given to the constitution, it may be well to quote from the opinion of the court in *Hans* v. *Louisiana*[1] where the court, by Mr. Justice Bradley, said, concerning the earlier "decision" so "reversed":

That decision was made in the case of *Chisholm* v. *Georgia* (2 Dall. 419), and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits. . . . *The Supreme*

[1] 134 United States Reports, page 1, at page 11.

Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. . . .

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the *highest authority of this country* was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm* v. *Georgia*, and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observation of the letter of the constitution without regard to former experience and usage. . . . Looking backward from our present stand-point at the decision in *Chisholm* v. *Georgia*, we do not greatly wonder at the effect which it had on the country. . . . Looking at the subject . . . as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, as the people of the United States in their sovereign capacity subsequently decided.

Not only did the court write so affably about the "actual reversal" of its decisions by "the people in their sovereign capacity," even going so far as to indicate *the court's* mature view to be that "the highest authority in the country" had been right in overruling the majority and sustaining the minority of the court, but the Supreme Court also, at this time (1890), when its attention was called to the fact that the particular question of jurisdiction before it did not come

within the explicit terms of the constitutional prohibition, held, nevertheless, that as it was clear that the people, at the time of the adoption of the Eleventh Amendment, had meant to rule and decide that the court should not construe the constitution to mean that a State was suable without its consent, no holding should be made which would defeat the manifest popular will.

A writer has well stated the fundamental view as to the essentials of republican government in this respect—note his words with care:

> As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant with the republican theory, to *recur to the same original authority*, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, none of them can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without *an appeal to the people themselves*, who, as the grantors of the commission, *can also declare its true meaning* and enforce its observance?

Who wrote those words? Mr. Roosevelt? Dean Lewis? No; they were addressed by Alexander Hamilton,[1] to the people of the State of New York, in explaining why he considered a sound principle of the Virginian constitution, framed by Thomas Jefferson, was not wholly applicable in the Federal sphere!

Elisha Mulford, in his profound volume, "The Nation," published just at the close of the war between the States, clearly summarized the spirit of American institutions in respect to matters of legislative power and policy:[2]

> The opinions of the judiciary cannot be regarded as the power determinative, in its ultimate action, of the destination of the State, nor accepted as the finality in its course, since this would be inconsistent with its existence in the realization of the freedom of the people. . . . The concession to the judiciary of an ultimate decision in the political sphere would be the reference of the destination of the State to a power . . . whose action is a precedent which is presumed to be final and beyond reversal, and whose opinion is a decision from which there is no appeal. Then the historical progress of the people would no longer be traced in the better institution of rights, and the broader freedom, and the more varied organization of its powers, but in judicial decisions rendered, it may be, upon feigned issues and pronounced over contending litigants.

[1] "The Federalist," Paper No. XLIX.

[2] "The Nation," by Elisha Mulford, page 203 (1870).

. . . To make the opinions of the judiciary a finality in the political order would fetter the free spirit of the people, confining it, not in the assertion and regulation of law as the determination of the organic will, but in the conformance to a mere legality. The past, by its precedents, would impose its authority upon the present. The energy of the people perishes when precedents become the substitute for the action of a living will and the strength of a living spirit. . . . The formative political power must belong only to the power which is representative of the political will.

In a brilliant address before the Law School of the University of Pennsylvania, on April 27, 1906, Chief Justice Walter Clark, of the Supreme Court of North Carolina, expressed the view which is held by an increasing number of jurists, State and Federal, who have made a scholarly and candid study of the relations of the courts to legislation. Said Chief Justice Clark:

The vast political power now asserted and exercised by the court to set aside public policies, after their full determination by the legislature, cannot safely be left in the hands of any body of men, without supervision or control by any other authority whatever.

What "other authority" could there be, under any conformance to the basic principles and the traditions of our form of government, than "the will of the ultimate sovereignty" of the people,

"superior to all legislatures and all courts"—"the highest authority in the land"?

Nor is this fundamental principle of republican government, so vigorously enunciated by jurists such as Mr. Justice Harlan[1] and Chief Justice Walter Clark, and by publicists such as Herbert Croly,[2] anything which present-day organs of "conservative" opinion have been able to challenge. The *New York Times*, a newspaper which no one has ever suspected of "progressive" tendencies, recently said, with great frankness:[3]

> That the definite will of the majority of the voters, deliberately formed, consistently adhered to, and fairly expressed, should determine the treatment of public affairs in all branches, *even the judiciary*, is the fundamental principle of democracy.

The test of a measure is often its alternatives. If Mr. Roosevelt's proposal is not adopted as a means of enabling the people of the States, *within the constitution*, to put in force the advanced economic legislation which they need, how will this be brought about, if at all? Answer may be taken from the frank admonition uttered by Elihu Root —chief critic of Mr. Roosevelt's proposal—may the method suggested by the senior senator from

[1] Page 79, *ante*. [2] Page 75, *ante*.
[3] Editorial: "In the Enemy's Country," January 24, 1912.

New York be deemed more likely to preserve the stability and integrity of the organic law? I quote from Mr. Root's now famous address before the Pennsylvania Society, in December, 1906:

> The governmental control which they (the people of the United States) deem just and necessary, they will have. It may be that such control would better be exercised in particular instances by the governments of the States, but the people will have the control they need either from the States or from the national government; and if the States fail to furnish it in due measure, sooner or later *constructions of the constitution will be found* to vest the power where it will be exercised.

If Mr. Roosevelt's proposal is "radical," what shall we say of Mr. Root's? Is it consistent with any principle of our government to leave our Federal courts to *find* "constructions of the constitution," to vest in the national government the discharge of functions which, but for lack of a suitable enabling procedure under the State constitutions, might fittingly be fulfilled by the States?

It remains to refer briefly to the contention that the proposal under consideration would in some unexplained way destroy or impair the honorable estate or high functions of our judges and our courts. The epithets applied have been bitter—"judicial vascetomy" is the delicate phrase

of one great metropolitan newspaper[1]—but the explanations and attempted demonstrations have been a looked-for but non-existent feature of this campaign of loose indictment. Is it not clear that the method under discussion would do no such thing, but that, on the contrary, it would restore and strengthen the traditional confidence of our people in our courts, by removing the unsuitable system which has caused popular resentment against the courts? Can we destroy our courts by restoring them to full popular favor? Will we impair their functions by relieving them of an ultimate "guess" as to something which should never have been theirs for final determination at all?

Congressman Gardner of Massachusetts has indicated with peculiar felicity just what is meant. In an address in the national House of Representatives on April 4, 1912, after arraigning vigorously all present agitation for judiciary reform in the United States, he referred to the "present age of Anglo-Saxon discontent," and reproachfully asked:[2]

> Why is it that in the wave of change that has swept over England, the British judges and British courts have not been the subject of attack? Why should discontent manifest itself in one direction at home and in another abroad?

[1] *Brooklyn Eagle*, June 2, 1912.
[2] *New York Tribune*, April 5, 1912.

The explanation of the fact upon which Congressman Gardner accurately commented is not far to seek. In the midst of the most seething, bitter discontent that has swept over any modern people, an era in which British democracy has been throwing off the fetters of an earlier feudalism, the British courts have stood unscathed, unchallenged, undisturbed in their administration of justice between man and man, *because they knew and every one knew that they had no power to interpose any barrier to the sovereign will of the people, on any matter of governmental policy or political philosophy!* No, to leave the judiciary free from the sphere of political or legislative discretion and policy, untrammelled in the administration of private justice and the enforcement of the sovereign public will, destroys neither the independence nor the integrity of the courts, but entrusts to them their highest functions. As was so impressively said by Mr. Justice Hughes at the dinner given by the New York County Lawyers' Association upon the occasion of his elevation to the nation's great court:

It is in any community and under any system of government a great privilege to be employed in the decision of controversies between man and man. It is a high function to be an arbiter of justice. The sentiment of justice, after all is said,

is the most important sentiment. But *in a democracy the highest privilege that any man can enjoy is to enforce the fundamental will of the people.* Let it never be forgotten that the constitution is ordained of the people to protect the people—to insure government by the people.

There are, of course, those who, even in this republic where the people have not infrequently erred in their choice of men, but have rarely erred in their adherence to principles and policies, believe that in a field of decision like that involved in these regulative matters, the possibility that the people, untrained in the formulas and traditions of the law, might ultimately sit in judgment upon the public soundness of a determination reached by a judge, could only impair the efficiency and independence of the judiciary and confer upon the people a task for which they are in no wise fitted and as to which their determinations could have neither value nor safety. This view as to the effect of submitting such matters to ultimate popular scrutiny was well answered by a distinguished Federal Judge—William Howard Taft—in an address in 1895 before the American Bar Association:

Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every

act of theirs is to be submitted to the intelligent scrutiny and candid criticism of their fellow men. . . . The comments made by learned text-writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus exert a strong influence to secure uniformity of decisions. But non-professional criticism is by no means without its uses, even if it is accompanied, as often it is, by a direct attack upon the fairness and motives of occupants of the bench; for *if the law is but the essence of common-sense, the protest of many average men may evidence a defect in a legal conclusion, though based on the nicest legal reasoning and profoundest learning.*

This belief in the essential conservatism and soundness of the judgments of the people themselves, when the affairs and policies of their government are placed before them for consideration and action, was never put more impressively in words than by Mr. George Bancroft, historian, scholar, and statesman, in an address before the Adelphi Society of Williams College, in which he said:

The best government rests on the people and not on the few, on persons and not on property, on the free development of public opinion and not on authority. The public happiness that is

the true object of legislation can be assured only by the masses of mankind, themselves awakened to a knowledge and care of their own interests. The world can advance only through the culture of the moral and intellectual powers of the people. To accomplish this end by means of the people themselves is the highest purpose of government.

The absence of the prejudices of the Old World leaves us here the opportunity of consulting independent truth, and man is left to apply the instinct of freedom to every social relation and public interest. Each great truth is firmly grasped, comprehended, and enforced, for the multitude is neither rash nor fickle. In truth, the multitude is less fickle than those who profess to be its guides. Political action has never been so constant and so unwavering as when it results from a feeling or a principle diffused through society. The people is firm and tranquil in its movements, and necessarily acts with moderation because it becomes but slowly impregnated with new ideas, and effects no changes except in harmony with the knowledge which it has acquired. Besides, where it is permanently possessed of power there exists neither the desire nor the occasion for frequent change. The government by the people is in very truth the strongest government in the world.

There may be those who scoff at the suggestion that the decision of the whole is to be preferred to the judgment of the enlightened few. They say in their hearts that the masses are ignorant; that farmers know nothing of legislation; that mechanics should not quit their workshops to join in forming public opinion. But true political science does, indeed, venerate the masses.

It maintains not, as has been perversely stated, that "the people can make right," but that the people can discern right. Individuals are but shadows, too often engrossed by the pursuit of shadows; the race is immortal; individuals are of limited sagacity, the common mind is infinite in its experience; individuals are languid and blind, the many are ever wakeful; individuals are corrupt, the race has been redeemed; individuals are time-serving, the masses are fearless; individuals may be false, the masses are ingenuous and sincere; individuals claim the divine sanction of truth for the deceitful conceptions of their own fancies, the Spirit of God breathes through the combined intelligence of the people. Truth is not ascertained by the impulse of an individual; it emerges from the contradictions of present opinions; it raises itself in majestic serenity above the strifes of parties and the conflicts of sects; it acknowledges neither the solitary mind nor the separate faction as its oracle, but owns as its only faithful interpreter the dictates of pure reason itself, proclaimed by the universal voice of mankind. It is when the multitude give counsel that the right purposes find safety. The decrees of the universal conscience are the nearest approach to the presence of God in the soul of man.

In a very fundamental sense, this proposal for the ultimate supremacy of the deliberate popular will in all which pertains to what government may do for the welfare of its inhabitants, represents that confidence in the mature common-sense of the people, when given the means for direct

and concrete expression, which must be the foundation for the continuance of the American form of government.

"New times demand new measures and new men."

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